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In the Supreme Court
of the United States

OCTOBER TERM 1971

No. 71-612

KURT VON POPPENHEIM,

Petitioner,

v.

PORTLAND BOXING & WRESTLING COMMISSION; JACK BATTALIA, NICK SCKAVONE, JOHN D. WELCH, EDWIN FITZPATRICK & ARNOLD C. HARRIS, individually and as members of the Portland Boxing & Wrestling Commission;

NATIONAL WRESTLING ALLIANCE, an Iowa Membership Corporation; DON OWEN, individually and as resident agent-member of the National Wrestling Alliance;

MOUNT HOOD RADIO & TELEVISION BROADCASTING CORPORATION, a Delaware corporation, NATIONAL WRESTLING ASSOCIATION OF AMERICA, INCORPORATED, and DON OWEN SPORTS, INC., an Oregon corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PORTLAND BOXING & WRESTLING COMMISSION; JACK BATTALIA, NICK SCKAVONE, JOHN D. WELCH, EDWIN FITZPATRICK & ARNOLD C. HARRIS, individually and as members of the Portland Boxing & Wrestling Commission;

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit filed on May 17th, 1971, and the order denying an en banc rehearing entered on August 9th, 1971.

OPINIONS BELOW

The Opinion of the District Judge, United States District Court for Oregon is unreported, set forth herein (Apx. B, p. 82). The Court of Appeals opinion is reported in 443 F.2d 1047, and set forth herein (Apx. C, p. 85). The petition for en banc rehearing was filed on July 12th, 1971 (Apx. D, p. 101) and is not reported; and was denied on August 9th, 1971. Thereafter timely notice of intent to apply for Writ of Certiorari was filed in the Court of Appeals and has been successively extended to and including November 8th. 1971 for the purpose of applying to the Supreme Court for the Writ of Certiorari.

JURISDICTION

Jurisdiction to review the judgment by Writ of Certiorari is found in 28 U.S.C.A. 1254(1) and Rules of this Court 19. Original jurisdiction was based on 28 U.S.C.A. 1337 and 15 U.S.C.A. 15 and 26.

STATUTES INVOLVED

U. S. Constitution, Art. VI (Supremacy Clause); Fifth Amendment (Due Process Clause) and the Fourteenth Amendment (privileges and immunities, due process and equal protection of the laws) set forth herein (Apx. F, p. 112).

Constitution of Oregon, Art. 1, § 20, pertaining

to privileges and immunities of Oregon citizens and equality of privilege (Apx. F, p. 112).

Title 15 U.S.C.A., §§ 15 and 26, An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies, commonly known as the Sherman Act and the Clayton Act, herein Apx. A, Ex. "a," p. 42 (the complaint) and (Apx. G, p. 113).

Rule 41(b) Federal Rules of Civil Procedure (Apx. G, Ex. "a," p. 115).

Oregon Wrestling Statutes ORS 463.010 et seq (Apx. A, Ex. "a," p. 48 et seq. and Apx. H, p. 117).

City of Portland, Oregon Wrestling Ordinance (Apx. A, Ex. "a," p. 44 and Apx. A, Ex. "c," p. 74).

QUESTIONS RESERVED FOR REVIEW

1. Can the federal judiciary prudently deny a hearing to a citizen denied his right by a "statutory regulatory agency" to pursue a lawful calling in the business of professional wrestling, which agency in concert and parallel action with other monopolists promulgated and adhered to an exclusionary rule refusing to grant competitive license in the assigned exclusive territories of favored promoters on petitioner's complaint raising constitutional questions, and unlawful monopoly and civil rights violations contrary to the organic laws of the nation and state, resulting in a denial of his right to work in a chosen lawful calling; and the grant to monopolists of an illegal privi-

lege and immunity to their sole licensee in his exclusive territory, all of whom are subjected to provisions of a consent decree pursuant to complaint made by the Attorney General of the United States under the Sherman Anti-trust Act in a District Court of the United States.[1]

This decision is violative of the Supremacy Clause of Art VI of the United States Constitution; deprives petitioner of due process of law under the 5th Amendment; and denying equal protection, privileges and immunities clause of the 14th Amendment; and Article 1, § 20, Oregon Constitution pertaining to Equality of Privileges and Immunities of citizens. *Truax* v. *Raich*, 239 U.S. 33; *Angel* v. *Buffington*, 330 U.S. 183, 190; *Aikens* v. *Wisconsin*, 195 U.S. 194, 204; *White* v. *Holman*, 44 Or. 180, 72 P. 993; *Truax* v. *Corrigan*, 257 U.S. 312, 329; *U.S.* v. *International Boxing Club of New York*, 348 U.S. 249; *Panama Refining Co.* v. *Ryan*, 293 U.S. 388; *Smith* v. *Texas*, 311 U.S. 128, 130; *Parker* v. *Brown*, 317 U.S. 341; *Northern Securities Co.* v. *U.S.*, 193 U.S. 197; *U. S.* v. *National Wrestling Alliance* (D.C. Iowa 1956) 1956 Trade Cases 68.507.

Subsidiary Question Fairly Comprised

(A) Is a city "regulatory agency" immunized from national and state constitutional restraints and anti-trust laws, so that a sole licensee can operate a

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[1] *U.S.A.* v. *National Wrestling Alliance, Civil Action* 3-729 Southern District of Iowa, Central Division, decree dated October 15, 1956, William F. Riley, Judge; reported in Federal Trade Commission Cases 1956-1957. (Apx. A, Ex. "b", p. 65).

wrestling business without competition in an exclusive territory.

2. Can a District Judge in a complex nationwide wrestling monopoly case prudently deny petitioner the right of discovery against a defendant, and concurrently require petitioner to reveal by "statement" prior to pretrial the identity of petitioner's witnesses, conspiratoral acts and evidence with specificity to defendants' satisfaction where defendants possess the power of economic dominion over witnesses who might be identified and control facts, where petitioner himself is ignorant of the intricate details exercised by monopolists, under penalty of prejudicial dismissal applied by the Court (Rule 41 b) FRCP, [Apx. G, Ex. A, p. 115].

This is a violative of the Fifth Amendment, (Denial of process). *Societe International* v. *Rogers*, 357 U.S. 206; 15 U.S.C. 1 (Sherman Act), *Tot* v. *U. S.*, 319 U.S. 463; *Hovey* v. *Elliott*, 167 U.S. 409, and *Hammond Packing Co.* v. *Arkansas*, 212 U.S. 322; *Radovich* v. *National Football League*, 352 U.S. 445; *Morgan* v. *U. S.*, 304 U.S. 1; *Collins* v. *Handyman*, 341 U.S. 651, 662.

Subsidiary Question Fairly Comprised

(A) Can a District Judge legally dismiss a nationwide wrestling monopoly suit where petitioner's counsel complied with Court Order in good faith by supplying defendants with their participating roles clearly delineated along with witness identity, sup-

porting evidence and their own admissions describing the details of the monopoly admitted under Rule 36, thereby denying a jury trial?

STATEMENT OF THE CASE

Petitioner, a long-time professional wrestler in Portland, Oregon, was denied a license to engage in the lawful business of conducting professional commercial wrestling events on September 23, 1963, by the Portland Boxing & Wrestling Commission, hereinafter known as the "Commission," on the ground:

> "That the issuance of a second wrestling matchmaker's license at this time would not be in the best interest of wrestling in the Portland area."

Defendant Owen since about 1950, for an annual commission fee of $25, possessed the sole right to conduct such commercial events, operating through himself as an individual and/or his corporate entity, Don Owen Sports, Inc., hereinafter known as Owen.

Plaintiff was denied relief in the state court (Apx. A, Ex. "c," p. 73), (R. 32) filed February 21, 1964. Defendant commission successfully demurred on a procedural ruse that plaintiff had not complied with the State Administrative Procedure Act. This was untruthful as the Commission itself had not filed their administrative procedure with the designated state official (R. 30, 31). See footnotes pp. 60, 61.

Plaintiff's Supreme Court appeal was aborted by

the legislature amending the wrestling statutes (Apx. A, Ex. "a," p. 48) and (Apx. H, p. 117) (R. 37) providing for "appointment" of the promoters-matchmakers instead of "licensing."

The Supreme Court opinion (Apx. A, Ex. "d," p. 80) (R. 37) held in part:

> "There was prior to this year no statute providing for either the appointment and/or license of wrestling promoters,"

and all that petitioner was seeking was an appointment. The Court omitted the constitutional challenges.

His state remedies exhausted and his lawful right to engage in this business being denied contrary to Article 1, § 20, Oregon Constitution (Apx. F, p. 112) in addition to the granting of an unlawful monopoly to respondents contrary to the organic laws of Oregon posed the denial of his rights under Article 6 (Supremacy Clause) and the 5th and 14th Amendments, U. S. Constitution. He sought federal relief on February 4, 1966, by the filing of a complaint (R. 2) pursuant to Sections 15 and 26 of Title 15 U.S.C. (Sherman Anti-Trust Act), based on allegations of anti-trust violations in Nationwide Professional Wrestling. The purpose of the action (Apx. A, Ex. "a,", p. 42) concerns the validity, construction and enforcement of a statute regulating commerce, to-wit: Oregon Revised Statutes 463.010 et seq.,—wrestling statutes,—and the action is brought to restrain the violations of plaintiff's civil right to engage in the law-

ful occupation of professional wrestling exhibition promoting. This action seeks relief by way of (1) Declaration of Oregon Wrestling Statutes as unconstitutional (2) Prohibition of enforcement of the Oregon Statute (3) Injunction against restraint of trade in wrestling and (4) Imposition of treble damages, costs and attorney fees. Suit is against the Commission and members by reason of the monopoly expressed in their writings; against Owen participating as the sole licensee, and as resident agent of the National Wrestling Alliance, hereinafter known as the "Alliance," by reason of violation of the government consent decree (Apx. A, Ex. "b," p. 65), and Mt. Hood Radio & Television Broadcasting Corporation as a participating monopolist as the sole owner of televising the Owen events intra and interstate for a substantial fee to Owen.

The defendants answered by way of general denial: The Alliance (R. 52) March 25th; Don Owen (R. 58) March 25th; Commission and members individually (R. 64) March 28th and Mt. Hood (R. 73) March 30th, 1966. Answers of the Commission and Mt. Hood were specifically detailed as to admissions and denials.

Plaintiff undertook discovery of the Alliance records in their St. Louis office on August 31, 1966 pursuant to motion filed on May 20, 1966. This resulted in Rule 36 admissions (R. 329) of documents listed (R. 335-470).

Plaintiffs' motion for production against the Com-

mission was filed May 27th, 1966 (R. 216)[2]. Judge Kilkenny ordered the Commission to produce the documents in an order from the bench (R. 917) on October 28, 1966.

Plaintiff moved the joinder of defendant National Wrestling Association of America on January 13, 1967 (R. 509) complete with supporting exhibits. Judge Kilkenny ordered joinder (R. 524) on January 13, 1967. Summons and complaint service was had on Jack Battalia, President of said Association, concurrently an individual defendant and chairman of defendant Commission.

The Association filed a general denial April 7, 1967 (R. 570). Plaintiff moved for discovery of documents against the Association April 11, 1967 (R. 586). This motion is still pending. The Court ceased discovery on April 24th, 1967; hence, petitioner is denied his rights of discovery against this defendant.

Defendant Don Owen Sports, Inc. was joined a defendant on April 24, 1967 (R. 618).

The Court Judge Solomon on April 24th, 1967 then said,

> "I want a statement of what the conspiracy or conspiracies consist, with specificity, and I should add, secondly, the names of the witnesses who will give you information concerning the existence of a conspiracy; and thirdly, the testimony you

[2] Pertinent Commission records were safeguarded by the Commission Secretary in his basement study at home and there examined by petitioner's counsel. Oregon law requires public records be in a state of depository.

believe these witnesses will give. With reference to point No. One, I think you should set out the parties to the conspiracy and the role which each of those played."

The foregoing was based on a statement by counsel Gilbertson to the Court, concerning their frustrations.[3]

Plaintiff filed a "statement" (R. 909) July 17th, 1967, to all counsel and the court. On December 18, 1967, Counsel Gilbertson filed his Motion for Involuntary Dismissal under Rule 41(b) F.R.C.P. on behalf of defendants Alliance, Association, Don Owen and Don Owen Sports, Inc. (R. 694). Similar motions were filed by Commission on December 20, 1967 (R. 730) and Mt. Hood. Respondents had not voiced previous dissatisfaction and time for objections passed.

The motions are based on the "failure of plaintiff to prosecute or the failure of plaintiff to comply with the Order dated April 24, 1967." (Rule 41(b))

Plaintiff filed his second "statement" February 1, 1968 (R. 772-787) complete with Plaintiff's Proposed Pretrial Order (R. 788-803), witness identity and evidence.

The Court requested a third "statement" on Feb-

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[3] It is unknown in which capacity or on whose behalf of various defendants respective counsel exhibited their cooperative frustrations after filing their answers.

Emory Crofoot, Esq.—represents the Commission and individual members;

John Gilbertson, Esq.—represents The Ailiance, the Association and Owen;

John Muller, Esq.—represents Mt. Hood.

ruary 6th, 1968, which was filed on March 8th (R. 846-898) complete with exhibits, witness identity and evidence. The Court on the February 6th appearance posed a problem to plaintiff regarding the applicability of the Sherman Anti-trust Act to an industry which is regulated. (Wrestling)

On September 16, 1968, the Court allowed the motions of respective defendants filed under Rule 41(b) F.R.C.P. and by his opinion (R. 806) dismissed the suit on September 16th, 1968 (R. 805) under F.R.C.P. Rule 41(b) [Apx. G, Ex. "a," p. 115].

At the time of this dismissal, there was pending before the Court an argument pertaining to the constitutionality of the Oregon Wrestling Statutes which was allowed by the Court on segregation of issues and set to be heard at the time of trial (R. 171), and petitioner filed his brief in accordance with the order of the Court (R. 174). Thus, these questions arising as a matter of law were before the Court and would require no "statements" as the respective parties had taken their positions on the basis of their briefs.

There was also outstanding petitioner's discovery against the newly joined Association. In this instance, it should be noted that there is a similarity in N.W.A. as the Alliance; and N.W.A. as the Association. In detailing the activities of the Association, a minimum of their relationship with the wrestling industry was disclosed by discovery of their blacklists and writings revealing their control efforts through their membership consisting of Commission members throughout

the United States designated as regular members, and associate members, being the various matchmakers, promoters, bookers, etc. Such documentation revealed a concert of action through the regulatory agency membership in order to achieve the monopoly aims by excluding competition in the various wrestling territories (Apx. C and J).

The facts before the Court reveal a combination of concerted action by the Commission as such adopting in writing an exclusionary rule against competition. The Commission members then participate as members of the Association to mutually honor as Commissioners the rules of other Commissions and control the wrestling business on behalf of the Alliance and its thirty-eight promoter members who actually do the promoting in this spectator industry. The Alliance being subjected to an anti-trust consent decree (*U. S. A.* v. *National Wrestling Alliance*, supra), then reaps the benefit of the exclusionary policies of the Commission's exercise through the Association. The promoter, defendant Owen, and the Alliance member and resident agent of said Alliance, is then protected in his Oregon territory to the exclusion of competition and harms to his business (Apx. I and J). Mt. Hood participates to the exclusion of other television stations in televising the Owen and Alliance related wrestling events for the profit of Owen and the Alliance, and itself pays Owen a substantial fee for the television rights, and also provides an announcer with expertise in wrestling events. Additional documentation admit-

ted under Rule 36 relating to the roles of the respective defendants set forth in Apx. E, p. 106.

The essence of the nationwide monopoly is perpetuated by the Alliance alloting geographical territory to an Alliance member, in this instance Owen. The licensing agency then restricting the license to an Alliance-approved member, the integrity of the favored promoter's territory is then recognized and maintained. The Association then follows through by its members acting as individuals or as Commissioners acting voluntarily in concert of actions to deny enroachment in their respective territories of a possible promoter.

It is no mere coincidence that where-ever there are professional wrestling events throughout the United States in various geographical areas that there is but one promoter and one supporting television station (Apx. I) and (Apx. J).

Under these circumstances, the Ninth Circuit opinion (Apx. C, p. 85) placing the onus on petitioner for what appears to be a failure to supply a statement to respondents, becomes dissipated in the light of the actual facts. The District Court opinion was filed on September 16, 1965 (Apx. B, p. 82) with elapsed time of approximately six months. The Ninth Circuit opinion ignores barricades erected against petitioner, namely a three month delay erected by the Alliance following petitioner's Motion to Discover; an approximate five month delay erection by the Commission in the discovery of its records; no

mention of the denial of discovery against the Association, which admittedly coordinates the exclusionary activities throughout the industry; no mention was made of the constitutional questions affecting the denial of petitioner's right to work in his chosen business, and no mention was made of the denial of his federal rights; and no mention of the untruthful certificate by the Commission regarding failure to adhere to the State Administrative Procedures Act in the State Court suit and totally ignoring respondents' own writings detailing their exclusionary activities.

REASONS FOR GRANTING THE WRIT

1. The refusal of the Oregon Court to grant petitioner relief from his denial by a regulatory agency operating under vague state laws for the purpose of adhering to requirements of an unlawful monopoly constitutes state action, is therefore unconstitutional and deprives petitioner of his liberty and property without due process of law.

This case comes to this court bristling with federal questions following dismissal by the District Court (Apx. B, p. 82) and the Ninth Circuit concurring (Apx. C, p. 85) on Appellant's asserted failure to comply with a court order to supply a "statement to respondent's satisfaction of their participation of their challenged activities." There was no hearing on the merits.

In this posture of the case, the allegations of the complaint would be taken as true, *U. S.* v. *International Boxing Club of New York*, 348 U.S. 249.

Factually, the unlawful denial of petitioner's right to work is so freely admitted by the Commission on September 23, 1963, and very strongly adhered to throughout the state and federal proceedings it is apparent the courts below, both state and federal, have held that petitioner is without remedy. The basis of the rulings appears to be that the petitioner has not convinced a District Judge of tenable jurisdiction. In short the state and federal courts below held that persons deprived of their freedom to pursue a chosen calling to which he is lawfully entitled under the Oregon and United States constitutions is without remedy unless such person first obtains the fruits of the calling which respondents have made it almost impossible to obtain; compare *Aikens* v. *Wisconsin*, 195 U.S. 194, 195.

Since respondents will undoubtedly urge that the lower court's rulings rest on non-federal grounds, the issue of this Court's jurisdiction is treated concurrently with the merits of petitioner's claims.

Fundamentally, a state acting through its judiciary may not deprive a person of all existing remedies supporting the enforcement of a right, which the state has no power to destroy, unless there is or was accorded some real opportunity to protect it, see *Truax* v. *Corrigan*, 257 U.S. 312, 329. It is also fundamental that when a specific federal right was denied or not given due recognition in a proceeding by a state court is a question to which petitioner is entitled to invoke the judgment of this court.

It is the province of this court to inquire not only whether the right was denied in express terms, but also whether it was denied in substance and effect, as by putting forward non-federal grounds decisions that are plainly untenable.

The District Judge and the Ninth Circuit relied heavily on the Oregon Court opinion in *Von Poppenheim* v. *Portland Boxing & Wrestling Commission*, 241 Or. 603, 407 P.2d 853.

The Oregon court avoided the facts, even avoided the untruthful basis of the Commission's demurrer as to the administrative procedure requirements which the commission itself had not complied with, avoided the constitutional questions, which raised the federal questions and bottomed the opinion on the legislative amendments. Owen reveals no distinction between his activities as a "licensee" in the old statute or as "appointee" under the new statute.

Inquiry by this Court is clearly indicated under the teachings of this Court in *Ward* v. *Love County*, 253 U.S. 17, 22 and *Lawrence* v. *State Tax Comm.*, 286 U.S. 276, 282 regarding the denial of federal rights.

The case of *White* v. *Holman*, 44 Or. 180, 74 P. 933 is analogous to the instant case by way of a legislative agency adopting an exclusionary rule in favor of a monopoly.

It is indicative of the Oregon law following Article 1, § 20, Oregon Constitution (privileges and immuni-

ties) and when not adhered to, then supports the petitioner in the instant case on his assertions of denial of his rights under the Article VI (Supremacy clause); the due process provisions of the 5th amendment, and the privileges and immunities and equal protection provisions of the 14th amendment.

White, a notorious local rogue, sought of The Sailors Boarding House Commission (being a legislative commission as is the local wrestling commission herein) a license to operate a sailors boarding house, there being only one such licensed boarding house with the proprietor having the support of the shippers. The Commission had adopted a rule excluding a competitive license unless the applicant was approved by the shippers. White sought and obtained mandatory relief in the State Court against the Boarding House Commission. The Commission's Supreme Court appeal was denied.

The Court reasoned that under the organic law of Article 1, § 20, Oregon Constitution that [Apx. F, p. 112].

> "No law shall be passed granting to any citizen or class of citizens privileges or immunities which, upon the same terms, shall not equally belong to all citizens."

although any unlawful business, the management of which might be injurious to the public, may be regulated provided that in so doing no privileges or immunities are granted to any individual that shall not equally belong to all citizens. The court applied the

reasoning of this court in *Butcher's Union* v. *Crescent City*, 111 U.S. 746 where the prior recipient of a monopoly was destroyed by statute; he contended this was irrepealable and brought suit against his rival from exercising the power attempted to be delegated. This Court held the monopoly feature was void from the beginning.

The Court recognized that if the business was such that a danger existed to the public health, peace or morals, the state could regulate or prohibit such by an exercise of its police power, nevertheless, the power attempted to be exercised by the commission was arbitrary in that there were no qualifications described by the legislature for the administrative agency.

The method selected by the Boarding House Commission to determine who should receive licenses was intended to create a monopoly of the business for the shippers and by concerted action could secure the appointment of only one person excluding all competition. The Commission could exercise no greater power than was possed by the Legislature; and that body could not create a monopoly in a legitimate business in which every person could engage as a common right.

It follows there is no distinction in the exclusionary rule adopted by the Boarding House Commission, namely, to limit the license to only those approved by the shippers, which the court held created a monopoly, and the exclusionary rule adopted by the defendant wrestling commission herein:

"That the issuance of a second wrestling matchmaker's license at this time would not be in the best interests of wrestling in the Portland area."

By the Commission denying his license after he made arrangements to conduct wrestling events, obtained financing, the arena and talent, the entire constitutional protections came into focus. The spectre of consent decree consideration was also revealed which clearly placed all of respondents herein under the disabilities and limitations of that antitrust decree and enforcements thereof by this petitioner, *U.S.A.* v. *National Wrestling Alliance*, supra, and [Apx. A, Ex. "b," p. 65].

It is evident from the documentation that the Commission has granted Owen, the promoter, an illegal immunity with an illegal privilege as the sole entrepreneur in the Oregon Alliance territory for the operation of his wrestling business (Apx. I and J), similarly Mt. Hood possessed the television rights in return of a substantial fee to Owen with advertising and announcers with expertise. This, notwithstanding the fact that state and federal guarantees assured petitioner are by intent, design, purpose and purport denied him.

The purpose of the Supremacy clause of Art. VI, of the constitution is to assure the supremacy of the national government over the states; and the purpose of the 5th Amendment is to assure that no person shall be deprived of his libery except by due process of law;

and the 14th Amendment is to assure equal protection and immunities to state citizens. As the 14th Amendment applies to the states in the execution of their organic laws, it immediately follows that Art. 1, § 20 of the Oregon Constitution has been denied petitioner, which raises a federal question under the 14th Amendment by reason of intentional and arbitrary discrimination, see *Sun Lake Iron Co.* v. *Wakefield Twp.*, 247 U.S. 350. It follows that an actual discrimination even arising from a fair law is invalid as creating a denial of equality, see *Rogers* v. *Alabama*, 192 U.S. 226. The 14th Amendment prohibits the unequal enforcement of valid laws as well as enforcement of invalid laws, see *East Coast Lumber Co.* v. *Babylon* (2 Cir.) 174 F.2d 106.

A critical examination of the Oregon Wrestling Statutes (Apx. H, p. 117) and (Apx. A, Ex. "a," p. 48) reveal the absence of guide lines, rules or the constitutional requirements for valid legislation. This then is violative of *Panama Refining Co.* v. *Ryan*, 293 U.S. 388 in which this Court discussed the guide lines necessary for valid exercise of legislative power "laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy is to apply."

And as stated by Mr. Justice Cardoza in his concurring opinion in the A.L.A. *Schechter Poultry Corp.* v. *U. S.*, 295 U.S. 495 "the delegated power must be canalized within banks that keep it from overflowing and that it cannot be unconfirmed and vagrant."

Hence, what might appear to be regulatory legislation is an illusory authority, the defendant Commission admittedly has no regulatory or administrative rules, yet the District Judge denominated the defendant commission as a regulatory agency, without a hearing on the constitutional challenges.

Accordingly, a state may not sit idly by while men lose their liberty in the competitive struggle for economic security to a monopoly. The lower courts, both state and federal, by denying this petitioner his relief have thereby subverted the enforcement machinery of government to the perpetuation of unlawful purposes as well as the inequities of the conspiracy [Apx. G].

If the 5th and 14th Amendments, and other provisions of the Constitution are to be given any meaningful effect, then the complaint against arbitrary action must be read as a command to all courts and states to protect their inhabitants from such unlawful conduct by others—especially when it is asked to do so by a citizen in the only forum which he can bring his complaint and which should hear his complaint on the merits.

> "The 14th Amendment requires that equal protection to all must be given—not merely promised," see *Smith* v. *Texas*, 311 U.S. 128, 130.

Illegal and unconstitutional practices invariably tiptoe their way into the law and it is the duty of the courts to be watchful for the civil liberties of a citizen. Judge Learned Hand put it thusly:

"The question is no less whether the courts

must put up with shifts and subterfuges in place of truth and are powerless to put an end to trifling. They would prove themselves incapable of dealing with actualities if it were so, for there is no surer sign of a feeble and fumbling law than timidity in penetrating the form to the substance" see *Loubriel* v. *United States* (2 Cir.) 9 F.2d 807, 808.

In retrospect, in *Von Poppenheim*, supra, a State Court may not sterilize federal claims by placing on the adjudication a local label, *Angel* v. *Buffington*, 330 U. S. 183, 190; compare *Collins* v. *Handyman*, 341 U.S. 651, 662.

In order to decide the validity of the ruling of the courts below it becomes essential to decide the breadth and scope of the constitutional protection for the federal rights which the petitioners asserted. Under such circumstances the jurisdiction of this Court is plain, *Creswell* v. *Knights of Pythias*, 225 U.S. 219, 261; *Enterprise Irrigation District* v. *Farmers Mutual Canal Co.*, 243 U.S. 157, 164.

It is simply arbitrary and capricious to hold that as against admitted monopolists, courts will afford protection of the constitutional rights to work for a living but will decline to give a remedy for the wrong. This would be a sheer deprivation of liberty without due process of law, *Truax* v. *Corrigan*, supra. As in this case, where a state court ruling restricts, undermines or destroys a federal right under the laws of Congress or the Constitution, this Court has jurisdic-

tion to review, *Postal Telegraph Co.* v. *Newport*, 247 U.S. 464.

If the Constitution and laws of the United States are to be enforced, this Court cannot accept as final the decision as to what the facts alleged to give rise to the right or to bar the assertion of it even upon local grounds, see *Davis* v. *Wechsler*, 263 U.S. 22, 24.

The gravamen of the complaint is the concerted and wrongful deprivation of the right to pursue a calling, the liberty to follow one's chosen calling, *Parker* v. *Lester*, 227 F.2d 708 (9 Cir.). Fundamental rights, when plainly invaded, are not unprotected merely because the wrongdoer has made the extent of his wrongdoing uncertain, *Bigelow* v. *R.K.O. Radio Pictures*, 327 U.S. 251. Moreover the complaint clearly alleges an action based on petitioner's asserted federal rights and it was a palpable denial of due process to withdraw even this protection from the petitioner, see *Truax* v. *Corrigan*, supra and *International News Service* v. *The Associated Press*, 248 U.S. 215, 216. Compare *Rogers* v. *Alabama*, 192 U.S. 226, 230.

For all the foregoing reasons, and others following, it is submitted that this Court has jurisdiction to review the substantial federal questions herein for a writ of certiorari. This Court should take alarm and grant review.

(A) A Regulatory Agency Possesses No Grant of Immunity under the Organic Laws of Nation or State Where in the Exercise of Illusory Power it Knowingly and Wilfully Participates in the Support of an Illegal Nationwide Sport Business Monopoly.

If these monopomists in control of all employment opportunity in the wrestling industry had agreed among themselves to exclude all persons of various ethnic origins from the industry and redress was denied to affected persons, it appears clear that this Court would consider the matter ripe for adjudication. *United Public Workers* v. *Mitchell*, 330 U.S. 75, 100; *Wieman* v. *Updegraff*, 344 U.S. 183, 191. And a court which upheld such an agreement would of course put the sanction of government behind it, *Shelley* v. *Kramer*, 334 U.S. 1; *Barrows* v. *Jackson*, 346 U.S. 249.

The central issue is whether this petitioner is without recourse to the Constitutional guarantees when these monopolists by agreement exclude him from the industry, compare *Truax* v. *Raich*, 239 U.S. 33, 38.

This is not a suit against a single employer, it is against a combination. "The evil is in the combination," *United States* v. *Reading Co.*, 226 U.S. 324, 353, compare *Hodges* v. *U. S.*, 203 U.S. 1, 18.

It is apparent that the participants have surrendered their power of decision and are agreed in the will of the combination. Petitioner is powerless to enter the ring surrounding the wrestling business and negotiate with free employers on a free basis. Compe-

tition among promoter employers and employee wrestlers is effectively throttled through the licensing agency and by agreement throughout the industry. This petitioner while pleading a complete deprivation of his rights to earn a living, has been denied all redress in the courts without a need for the admitted wrongdoers to prove their conduct was warranted. It is difficult to position a more flagrant series of denial of rights. Mr. Justice Holmes stated in *Aikens* v. *Wisconsin*, 195 U.S. 194, 204:

> "It has been considered that, Prima Facie, the intentional infliction of temporal damage is a cause of action, which, as a matter of substantive law, whatever may be the form of pleading, requires justification if the defendant is to escape."

This combination having arrogated itself to power, controls the employment throughout the industry. In short what the Constitution forbids the government of the United States to do, this combination has accomplished, see *Associated Press* v. *United States*, 326 U.S. 1, 20. The conduct of these respondents trenches upon the Supreme Law of the Land which guarantees fundamental rights and privileges. This Court itself has emphasized the vitatity of the Fifth Amendment and the need to protect the Amendment from subtle encroachments by public or private agencies, being one of the most valuable prerogatives of the citizen, see *Slochower* v. *Board of Education*, 350 U.S. 551, 557; and in *Emspak* v. *United States*, 349 U.S. 190, 194 warned against perversions of the Amendment's meaning and significance thus:

> "Otherwise, the great right which the clause was intended to secure might be effectively frustrated by private pressures."

The teachings in White, supra, clearly shows that an administrative agency exceeds its authority when it is the intent of a rule to create a monopoly. Certainly with that ruling in mind, respondents must realize there is no immunity in a conduct forbidden for the benefit of themselves and others. It cannot be said these respondents were ignorant of the arbitrary discrimination against this petitioner. This is an intentional violation of the essentials of rights, see *McKay Tel. & Cable Co.* v. *Little Rock*, 250 U.S. 94. See also *Yick Wo* v. *Hopkins*, 118 U.S. 356 and *Norris* v. *Alabama*, 294 U.S. 587.

It appears there is no immunity as such, inserted in the Sherman anti-trust act directed towards state agencies. An analysis of *Parker* v. *Brown*, 317 U.S. 341 reveals the Sherman Act makes no mention of the state as such and gives no hint that it was intended to restrain state or official action directed by a state. True, a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring their actions legal, see *Northern Securities Co.* v. *U. S.*, 193 U.S. 197.

In *Marnell* v. *United Parcel Service*, 260 F. Supp. 391 (D.C. Cal.). The gist of defendants' activities was whether such were directed by the Utilities Commission. The Court reasoned that the monopoly power prohibited by the Sherman Act was the possession of

the power or the attempt to gain it in the relevant market with the intent to acquire and maintain the power, citing *U. S.* v. *Grinnell Corp.*, 394 U.S. 563. Therefore, the State of California could not validly exempt either expressly or impliedly from the federal anti-trust laws conduct of motor carriers that would otherwise so restrain or affect interstate commerce as to violate U. S. Constitution, Art. VI. The Court then buttressed the holding by referencing the oft quoted opinion in *Swift* v. *U. S.*, 196 U.S. 375. "It is suggested that the several acts charged are lawful, and that intent can make no difference. But they are bound together as the parts of a single plan. The plan may make the parts unlawful." Compare *Harman* v. *Valley National Bank of Arizona*, (9 Cir.) 339 F.2d 564.

The teaching of *Parker*, supra is that the anti-trust laws are directed against individual and not state action. But that was in an industry (raisins) important to the interest of the state. Nevertheless it must be state action and supervised by independent state officials, and not the action of individuals masquerading as state action. Anti-competitive practices may receive only cursory inspection by state officials or public officials may approve of conduct without consideration or awareness of its anti-competitive practices. The pertinent issue is whether the decision makers were public officials or private businessmen. Compare *Woods Exploration & Pro. Co.* v. *Aluminum Co. of Amer.*, 438 F.2d 1286.

In the instant case, note the various commissioners are members of the association and as individuals then promulgate the exclusionary policies of the Association, and in their capacity as Commission members enforce those policies for the benefit of the financial gain to the promoters, the Alliance, and others.

Although the Alliance and others in the wrestling industry is subjected to the consent decree (Apx. A, Ex. "b," p. 65), there is an atempt to circumvent that decree by way of the "regulatory agencies" and of course this brings in other participants.

A legai opinion provided by National Wrestling Alliance President Muchnick of St. Louis to City Attorney Crofoot, representing the Commission and members (R. 887):

> "that a municipal body is not subject to anti-trust laws."

Counsel is unable to reconcile that opinion in the light of the foregoing opinions and the organic laws of the nation and state nor is he able to reconcile such opinion with the expressions of the court in *White*, supra. It is doubtful if this Court will read into the provisions of the anti-trust laws, as applied to this case an immunity to a "regulatory agency" actually defying the government consent decree; nor immunize the agency and other monopolists from the laws of the land.

It is obvious that wrestling is a business (Apx. J), but a business of sports is no exception to the

anti-trust law, *Pacific Lanes* v. *Washington State Bowling Properties Assn.*, (9th Cir.) 356 F.2d 371. In *U. S.* v. *National Football League*, 116 F. Supp. 319, the court rejected the contention that professional football was not interstate commerce; the teams being supported by radio and televisions which is clearly interstate commerce. "If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze."

By way of analogy, there is a strong similarity between the boxing and wrestling business, in both cases the boxers or wrestlers (commercial) travel community to community. They are in the employ of a promoter; radio, televisions, newspapers and news media play an important role in their financial gain. In some instances a local boxing match might be a local affair; but that fact alone does not bar application of the Sherman Act, if the business itself is engaged in interstate commerce. An effort was made in *U. S.* v. *International Boxing Club of N. Y.*, 348 U.S. 259 to exempt the boxing business from the anti-trust act provisions under the authority of *Toolson* v. *New York Yankees*, 346 U.S. 356. The Court also considered *U. S.* v. *Shubert*, 75 S. Ct. 277; in these cases the Court opinioned that *Shubert*, supra, and *Toolson*, supra were not authority for exempting other businesses because of the possible local features of the exhibitions; that ruling applied in *International*, supra. This court commented on the various bills introduced in the Congress regarding exempting professional sports from anti-trust laws. The House report

was embodied in the *International* opinion, supra, of this Court, which, of course reversed the lower court who dismissed the complaint on the authority of *Toolson*, supra.

> "The required exemption would extend to all professional sports enterprises. The law would no longer require competition in any facet of business activity of any sport enterprise. Thus the sale of radio and television rights, the management of stadia, the purchase and sale of advertising, the concession industry as well as the aspects of baseball which are solely related to the promotion of competition on the playing field would be immune and untouchable. Such a broad exemption could not be granted without substantially repealing the anti-trust laws." International supra.

This Court had the benefit therein of a brief filed by The State of New York and The New York State Athletic Commission, as Amicus Curiae. The Commission as Amicus supervises boxing and wrestling. Amicus argued strongly that professional boxing be not excluded from the anti-trust laws:

> "To grant such a judicial exemption would leave highly integrated commercial enterprises subject to no binding uniform control and operating without possibility of effective overall regulation in a chaos of competiting and overlapping state dominions.—In short, such boxing promotions have been and can be so unlocalized as to make federal regulations not only legally appropriate but urgently required."

Amicus revealed little uniformity between the states on monopoly questions; licensing standards in many jurisdictions were often incomplete or wholly unexpressed. Amicus then referred to informal state compacts and said,

> "States cannot band together to legally control boxing without surrendering sovereignty or obtaining the approval of Congress"

As in *International*, supra and in the instant case, the court was concerned with the sufficiency of the complaint and held the complaint states a cause of action allowing the government to prove its allegations. There is an immediate parallel between the instant case and that of *International*, supra.

The activities of the Association herein have all the earmarks of an illegal interstate compact for the control of the wrestling business, and obviously a state cannot surrender sovereignty for the purposes of participating in an unlawful monopoly [Apx. G, p. 113]. It should also be noted that the consent decree against the Alliance, supra was dated 1956, following *International*, supra.

The decisions of this and other courts clearly reflect an absence of immunity to regulatory commissions.

> "No immunity exists in law for public officials who have criminally or tortiously peprived persons of their fundamental rights, whether such persons acted in their official or private capacities," *Ex parte Virginia*. 100 U.S. 339, 348.

As in *International*, supra, petitioner herein should be permitted to prove the allegations of his complaint to a jury. The decisions of this Court and the mandates of the Congress should not go unheeded by way of depriving citizens of their rights.

2. The court requirement of a "Statement" in detail to monopolists satisfaction and the ceasing of petitioners discovery under threat of prejudicial dismissals burdens petitioner with procedural shackles inconsistent with due process.

The District Court's concept of pre-trial discovery was admittedly novel, in addition where respondents had possession and controlled the intricate facts within the combination. It is indeed novel that petitioner be required to paint a picture to their satisfaction.

This raises a fundmental issue as to the power of the federal courts to disregard the jurisdictional provisions of the Sherman Act. The problem of the "statement" arose after the parties had answered; and most certainly being in possession of the facts they sought, did not require a "statement." Nevertheless, being in a combination where the right to work was so well controlled it would be an economic burden to those within the combination to be disclosed who might not be adverse to participating as a witness. Undoubtedly, this was the purpose of the "statement." The industry being controlled, and the Oregon Territory of Owen is a good example, a wrestler must seek employment from Owen, and sat-

isfy Association and license requirements or be denied the right to work.

This Court held in *Hickman* v. *Taylor*, 329 U.S. 495 that the new Rules were intended to allow "fullest possible knowledge of the issues and facts before the trial" and for that purpose to permit "Mutual Knowledge of all the relevent facts gathered by both parties." The courts below departed from this premise of mutuality and demanded full production of witness identity and evidence even before discovery was completed. On the one hand the court required the statement, and on the other hand ceased discovery against a crucial defendant. Respondents own writings clearly reflect their own conduct and such was available in the Court file as a matter of record.

Petitioner, not being a member of the combination, necessarily was not acquainted with the intricate details. He knew that he could not obtain employment in the industry and that the Portland Commission would not license him, compare *National Wrestling Alliance* v. *Meyers*, 325 F.2d 768.

Under the rules expressed by this Court in *Hovey* v. *Elliott*, 167 U.S. 409 *Hammond Packing Company* v. *Arkansas*, 212 U.S. 322 the power to dismiss a complaint for failure to comply with a court order was limited to a willful non-compliance by virtue of bad faith in the pleadings of the offending party. In this case, and viewed in the perspective *Tot* v. *U.S.*, 319 U.S. 463, any presumption of bad

faith would be a denial of due process, consequently an infringement on 5th Amendment rights.

Plaintiff is not required to document an actual unlawful agreement, such could be inferred from evidence of more than coincidental sequence of events, *National Gas Appliance Corp* v. *Manitowoc Co.*, 311 F.2d 896 (7 Cir.), again wherever there is wrestling, there is only one promoter (Apx. I and J). The courts should not add requirements to burden a private litigant beyond what is specifically set forth by Congress, see *Radovich* v. *Nt'l Football League*, 352 U.S. 445; [Apx. G, p. 113].

Again, where the facts sought by respondents were in their own possession a picture painted by petitioner would never be satisfactory. However, this points out that where the court ignores reality and has regard for mere form in a proceeding where the livelihood of an individual is at stake, such does not measure up to constitutional requirements, see *Morgan* v. *U.S.*, 304 U.S. 1.

The limitations of the court's authority was discussed by this Court in *Societe*, supra, by way of comment on Rule 41(b); [Apx. G, Ex. "a," p. 115], the rule being limited to "trials" and "lacks specific reference to discovery." The court considered Rule 37 applicable to "refusal to Obey"—obviously in the instant case there was no such refusal, petitioner furnished three separate statements complete with witness identity and evidence—Reliance on Rule 41 could not be interpreted to afford a court more expansive

powers than does Rule 37. The Court in considering Rule 37, opinioned that the rule "must be read in the light of the provisions of the Fifth Amendment, that no person shall be deprived of his property without due process of law. It is in this light that the authority of the courts should be examined in the case where respondents conduct is well documented.

Thus, there are constitutional limitations on the power of the courts, even in the aid of their own valid process, to dismiss an action without affording a party the opportunity for a hearing on the merits, compare *Hovey*, supra and *Hammond*, supra.

While the petitioners complaint (Apx. A, Ex. "a," p. 41) complies with the requirements of Rule 8 F.R.-C.P. and as to conciseness and directness under Rule 10 F.R.C.P. it therefore did not call for application of Rule 12 F.R.C.P.

The proof being largely in the possession and control of the participants in this case there would be no requirement of a "statement" compare *Michigan Gas & Elec. Co.* v. *American Elec. Power Co.*, 41 F.R.D. 462 (D.C. N.Y.). There are no special rules of pleadings in anti-trust cases and particularly a statement of circumstances is not required, compare *Walker Distributing Co.* v. *Lucky Lager Brewing Co.*, 362 F.2d 1008 (9 Cir.). There is no requirement that petitioner plead his evidence, see *Hoffman* v. *Holden*, 269 F.2d 280, 294-295 (9 Cir.). Even under Rule 12 (e) a motion for a statement should be denied under the facts in this case, compare *Brozozow-*

ski v. *Randall*, 218 F. Supp. 306 (D.C. Pa.). It is simply arbitrary to require petitioner to disclose his evidence and witness identity where the effect would be to subvert the legal process. compare *Marine Leasing Service Inc.* v. *S & W Barge Lines*, 11 F.R. Serv. 2d. 12 (e) 21; 42 F.R.D. 659 (D.C. Miss.) *Richardson* v. *St. Charles-St. John The Baptist Bridge and Ferry Authority*, 274 F. Supp. 764 (D.C. La.).

Certainly the information sought by the defendants was better known to them, than to the plaintiff, compare *Funk* v. *Cable*, 251 F. Supp. 598 (D.C. Pa.); compare, *Makan Amusement Corp.* v. *Trenton Theaters* (D.C. N.J. 1944) 3 F.R.D. 429.

Dismissal with prejudice where the suit has not been heard on the merits is contrary to the decisions of this Court. In *Hovey*, supra, even where it was intended as punishment for contempt, dismissal without a trial on the merits was a denial of due process of law, compare *Duell* v. *Duell*, 178 F.2d 683, 689.

Any presumption of bad faith on the part of the petitioner herein would be ludicrous where he has been trying since 1963 to obtain his promoters license would be unconstitutional under the ruling of *Tot*, supra., see also *McMullen* v. *Squier*, 144 F.2d 703 (9 Cir.) and *Societe*, supra.

Consequently since the court held that since petitioner had not satisfied respondents and his version of the jurisdictional requirements even though evidence had been submitted, the dismissal would be an

infringement on the rights of this petitioner under the Fifth Amendment.

The "requirement of the statement" prior to completion of discovery was oviously improper, and summary procedures should not be instituted while pretrial discovery remained unfinished, compare *Smith-Corona Marchant, Inc.* v. *American Photocopy Equipment Co.*, (D.C. N.Y.) 217 F. Supp. 89.

By contrast, with the admitted power of monopoly exercised by these respondents, this petitioner is denied his day in court, solely on what appears to be the requirement of a statement to the satisfaction of these respondents. Our judicial procedure still adheres to the satisfaction of a jury. If this dismissal is permitted to stand, the Constitution and decisions of this Nation and Court will be as effective as a bladeless knife.

It follows that the District Judge exceeded the bounds of proprietry, and exceeded constitutional limitations. This Court should exercise its power of supervision in order that rights of citizens be not denied.

(A) Prejudicial Dismissal is a Violation of Due Process when Petitioner in Good Faith Complied with Asserted Invalid Court Order.

The record supports petitioner furnishing respondents in good faith with three separate statements, complete with witness identity and evidence. It is simply unrealistic that respondents are unable to understand their respective positions.

The content of petitioners' three statements included witness identity and evidence, roles of the various parties and their relationship, thus, substantial fact questions were raised precluding a dismissal, see *Ingram* v. *Phillips Petroleum Co.*, (D.C. N.M.) 252 F. Supp. 674. The documents relating to discovery clearly related to the mutual awareness and activities of the respondents, purely and simply as foot prints on the sands of the desert. A diary of their activities.

Disregarding for the moment that the statements were inadequate which must have been in the mind of the court, nevertheless petitioner has sufficient evidence, direct evidence to support his claims. But even disregarding the direct evidence, certainly petitioner can support his claims by way of circumstantial evidence to a jury, see *Viking Theater Corp.*, v. *Paramount Film Distributing Corp.*, 320 F.2d 285.

Compliance in good faith can in no manner be construed as a penalty in support of a dismissal in the light of the pleadings, the documents in the court files or the posture of the case at the moment. It warrants a hearing on the merits, see *Societe*, supra and *U. S.* v. *International Boxing Club*, supra and the 5th Amendment.

The fact that the three statements were submitted by petitioner constittues compliance for legal purposes. The construction of the statements by the Court then becomes advocacy by the Court. This results in a complete denial by the Court of 5th Amendment rights enjoyed by this petitioner; and in effect lends the au-

thority of the state acting through the judiciary to grant respondents immunity from scrutiny.

The agreement to exclude petitioner then becomes a conspiracy and a deprivation of the laws of equal protection. See *Collins* v. *Handyman*, 341 U.S. 651, 662.

CONCLUSION

The facts and principles of law showing violations of the 5th and 14th Amendments and of the supremacy clause of Article VI simultaneously establish the jurisdiction of this Court, therefore, this Court is repectfully requested to exercise its powers of supervision and direct the issuance of the writ prayed for to the Ninth Circuit Court of Appeals.

Respectfully submitted,

ADELBERT G. CLOSTERMANN
Attorney for Petitioner

APPENDIX A

EXHIBIT A
HISTORY OF PETITIONERS LITIGATION

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE DISTRICT OF OREGON

KURT VON POPPENHEIM, *Plaintiff*, v. PORTLAND BOXING & WRESTLING COMMISSION; JACK A. BATTALIA, NICK SCKAVONE, JOHN D. WELCH, EDWIN FITZPATRICK and ARNOLD C. HARRIS, individually and as members of Portland Boxing & Wrestling Commission; NATIONAL WRESTLING ALLIANCE, an Iowa membership corporation; DON OWEN, individually and as resident agent-member of National Wrestling Alliance; and MOUNT HOOD RADIO & TELEVISION BROADCASTING CORPORATION, a Delaware corporation, *Defendants.*	Civil No. 66- COMPLAINT and APPLICATION for Three-Judge Court ANTI-TRUST VIOLATION Wrestling Monopoly

Plaintiff complains and shows to the Court:

JURISDICTION AND VENUE

(28 USC 1337; 15 USC 15; 15 USC 26)

1. This complaint is filed and these proceedings are instituted against the above-named defendants

under Sections 15 and 26 of Title 15 U.S.C., being a part of the Act of Congress of July 2, 1890, Chapter 647, 26 Stat. 209, as amended, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," commonly known as the Sherman Act and the Clayton Act.

2. Each of the corporate defendants transacts business, maintains offices and may be found within the District of Oregon. The offenses hereinafter alleged are being carried out within said District of Oregon.

PURPOSE OF ACTION

3. The basis of this action concerns the validity, construction, and enforcement of a statute regulating commerce, to-wit: Oregon Revised Statutes 463.010 et seq, and the action is brought to restrain the violation of plaintiff's civil right to engage in the lawful occupation of professional wrestling. This action seeks relief by way of

a. Declaration of Oregon statute as unconstitutional

b. Prohibition of enforcement of the Oregon statute

c. Injunction against restraint of trade in wrestling

d. Imposition of treble damages, costs, attorney fees

DESCRIPTION OF THE PARTIES

4. Kurt von Poppenheim, a life-long resident of Portland, Oregon, is a professional wrestler. He was born and educated in Portland, owns his home here, is married, and has raised and educated a family of five daughters. He began wrestling in 1937 at the Young Mens Christian Association and Multnomah Athletic Club in Portland and thereafter engaged in professional wrestling throughout the United States and Canada for his livelihood. Throughout his tour of duty with the United States Navy during World War II he wrestled for the entertainment of military personnel in addition to performing his assigned shipboard duties. Following his honorable discharge he returned to Portland where he resumed professional wrestling for his livelihood and the support of his family. He also wrestled for the entertainment of army personnel at Vancouver, Washington. He holds numerous wrestling championships, honors and awards including the Pacific Coast junior heavyweight championship and the Intermountain junior heavyweight championship (undefeated).

5. The defendant Portland Boxing and Wrestling Commission, hereinafter referred to as the Commission, is a duly constituted Commission of the City of Portland, created pursuant to O.R.S. 463.010 et seq. as amended by Oregon Laws, 1963, Chapter 426, and Oregon Laws, 1965, Chapter 200, and by the authority therein delegated to the Mayor of the City of Portland to appoint the members of said Commission

pursuant to the following ordinance enacted by the Council of the City of Portland:

> Article 24: Boxing Commission No. 3-2401—Article 24 added by Ord. No. 73508 March 18, 1943 and effective Nov. 7, 1942.
>
> Section 3-2401—Certain city officials to render certain services.
>
> The Council finds that by the provisions of OCIA Section 95-2503 and 95-2504 certain functions are to be performed by the Council and certain city officers; now, therefore, the City Officials referred to in said sections are hereby permitted and authorized to exercise the functions therein stated for and on behalf of the State as herein provided. This article shall be effective as of the date of the repeal of Ord. No. 70779, to-wit: Nov. 7, 1942.

6. The defendants Jack A. Battalia, Nick Sckavone, John D. Welch, Edwin Fitzpatrick and Arnold C. Harris were appointed as members if the Commission and are joined herein individually, each in his personal capacity, as well as in his official capacity, are residents of Oregon.

7. The defendant National Wrestling Alliance, hereinafter referred to as the Alliance, is a corporation organized and existing under the laws of the State of Iowa, and is an association with a membership consisting of approximately thirty-five bookers including defendant Don Owen of Eugene, Oregon. It was incorporated in or about January 1951 as the successor to an unincorporated association of bookers,

organized in or about 1948, also known as the National Wrestling Alliance or NWA. Since in or about 1950, the Alliance has maintained its principal offices and headquarters at the Claridge Hotel, St. Louis, Missouri, and it transacts business throughout the State of Oregon through defendant Don Owen as its resident agent-member.

8. The defendant Don Owen is a resident of Eugene, Oregon, and is joined herein individually, in his personal capacity, as well as in his capacity as resident agent-member of National Wrestling Alliance.

9. The defendant Mount Hood Radio and Television Broadcasting Corporation, hereinafter referred to as Mount Hood TV, is a Delaware corporation qualified to transact business within the State of Oregon and owns and operates KOIN-TV, Portland, Oregon, and the principal office of said corporation is Public Service Building, Portland, Oregon.

10. Whenever it is herein alleged that the Commission, Alliance or Mt. Hood TV did any act or thing, such allegation shall be deemed to mean that the officers, agents, and employees of the said defendant authorized, ordered or did such act or thing on behalf of said defendant while actively engaged in the management and operation of the business affairs of said defendant.

NATURE OF THE TRADE AND COMMERCE INVOLVED

The Sport of Wrestling

11. Wrestling is a popular and wholesome sport of ancient origin and is based on the prowess, skill, physique of participants in the use of muscles and limbs in coordination to best their opponent. It has been defined as engaging in a contest, usually between two persons, who seek to throw each other to the ground or floor, commonly in such a manner that one contestant's shoulders are held against the ground or floor. Wrestling is not immoral in its nature or injurious in its consequences, nor is it inherently and essentially evil.

Description of the Trade

12. The exhibitions of professional wrestlers constitute a distinct category of entertainment. Professional wrestling is a business conducted through various promoters or matchmakers wherein participants display their skills to audiences for a fee, wage, commission or salary, pursuant to the execution of contracts for that purpose with a promoter, matchmaker or similar person. These are exhibitions, shows or appearance for spectatator entertainment and greater appeal to the public in general by way of commercial television, similar in nature to travelling theatricals and vaudeville, and a recognized business for profit. Annually the American public spends approximately $20 million to attend public exhibitions. The revenues from studio exhibitions have approximated $5 million.

Interstate Commerce in Wrestling

13. Professional wrestlers do not usually engage in more than one exhibition in a given community or locality before moving on to another. They customarily tour throughout the United States, or a large part thereof, frequently participating in several prearranged exhibitions each week in different communities or localities.

Scope of Authority of the Alliance

14. Despite the itinerant nature of their performances, most professional wrestlers do not retain the services of managers to arrange their appearances in exhibitions and to book their tours. These services are provided by the Alliance and its members, including defendant Don Owen, and exhibitions are usually scheduled so that appearances will be frequent and so that successive exhibitions will be given in communities or localities which are close to one another, thereby minimizing travel expenses.

15. In booking professional wrestlers, the operations and activities of the Alliance and its members, including defendant Don Owen, entering into contracts or arrangements in the wrestlers' behalf with promoters are nationwide. The majority of bookings are for unrelated promotions.

16. The members of the Alliance, including defendant Don Owen, are the only large-scale bookers in the United States, representing virtually all of the professional wrestlers' bookings for studio exhibi-

tions, and generally have no comparable competitors.

17. Besides operating in the booking field, many members engage in related promotions, a substantial number of which are televised or filmed.

Scope of Authority of the Commission

18. The Commission commenced to function as a municipal boxing commission pursuant to Oregon Laws 1919, Chapter 344, approximately in the year 1920 when the census of the city of Portland reflected a population of 258,288; amendment by Oregon Laws 1935, Chapter 290, changed the designation to a boxing and wrestling commission.

19. The Oregon statutes pertaining to wrestling as they existed in 1950 were as follows:

> OCLA 95-2501. Creation of commission: Appointment of members: General powers and duties: State advisory board: Presentation of questions to board: Extent of jurisdiction.
>
> There hereby are created boxing and wrestling commissions hereinafter called the "commissions" which shall be appointed by the mayors of the cities or towns where said commissions shall have control and jurisdiction. Said commissions shall have power to carry out the provisions of this act and their duties shall be such as are provided herein. The governor, secretary of state and attorney general shall act as a state advisory board when questions involving said commissions shall arise and the city attorneys of the respective cities or towns shall have the sole power to present to the state advi-

sory board such questions as they may deem necessary for the consideration of the said board, which shall have the sole discretion in passing on such questions. The commissions as herein provided shall have jurisdiction over all boxing and wrestling competitions within the county in which they are located; provided, however, where two or more commissions exist within one county the commission nearest the point of the proposed competition shall have jurisdiction. (L. 1919, ch. 344, sec. 1, p. 607; O.L. sec. 3879; O.C. 1930, sec. 56-2901; L. 1935, ch. 290, sec. 1, p. 445.)

OCLA 95-2507. Jurisdiction over wrestlers, etc., and wrestling matches: Licensing powers; Collection of license fees: Limitation on application of act.

All professional wrestlers, wrestling managers and seconds shall come under the jurisdiction and be subject to the rules and regulations of each commission and be controlled by this act the same as others named in this law. The said commissioners shall have power to license referees, professional wrestlers, the managers of wrestlers, and seconds, and also to collect such fees as they shall deem just and reasonable. Wrestling competitions shall be held only under license of the commission, which shall collect a fee of 6 per cent from the gross receipts of each competition. It shall be the duty of the secretary to check the gross receipts and collect the 6 per cent fee after each wrestling competition. The provisions of this act shall not apply to nor interfere with any wrestling tournament given under the sanction or auspices of the amateur ath-

letic union of the United States or any of its auxiliary organizations in which any registered members of said union or organizations participate. (L. 1929, ch. 386, sec. 6, p. 491; O.C. 1930, sec. 56-2907.)

20. The foregoing statutes were continued in the 1953 Revised Statutes under section 463.010 et seq. Oregon Laws 1955, Chapter 426, added to ORS 463.130 the provisions:

> No person other than a person of the male sex shall participate in or be licensed to participate in any wrestling competition or wrestling exhibition.

and Oregon Laws 1963, Chapter 426, added a new section, ORS 463.115: Services of Portland Boxing and Wrestling Commission may be given under contract to other cities.

21. Oregon Laws 1965, Chapter 200, made further changes concerning wrestling as covered by ORS 463.010 et seq. to read as follows:

> ORS 463.020 (1) No person shall engage in a boxing or wrestling match without having first registered with and received from the secretary of the commission having jurisdiction of the match, the permit provided for in 463.060. Only persons of the male sex shall receive a permit to participate in a boxing match. (2) All referees, managers and seconds in any way connected with any participant in any boxing or wrestling match shall obtain a license from the commission having jurisdiction of the match, and

must comply with the rules and regulations of the commossion.

ORS 463.030 (1) No boxing or wrestling match shall be held without the consent or beyond the jurisdiction of a commission. (2) Every person, club, corporation or association holding or showing any boxing or wrestling matches on a closed circuit telecast or subscription television viewed within this state, whether originating within this state or another state, shall furnish the commission having jurisdiction where shown, a written report under oath, stating the exact number of tickets sold for such showing, the amount of gross proceeds therefrom, and such other matters as the commission may prescribe, and shall, within 24 hours after the showing of the match, pay the commission a license fee of six per cent of its total gross receipts from the sale of tickets for the showing of the boxing or wrestling match. (3) No person shall hold any boxing or wrestling match on Memorial Day, Veterans Day or Sunday.

ORS 463.120 . . . (3) The commissions may: (a) at all times make rules and regulations not in conflict with this chapter under which all boxing and wrestling matches shall be conducted incluidng, but not limited to, the payment of participants. (b) License referees, managers, boxers, wrestlers and seconds and collect such fees as they deem just and reasonable. (c) Hold boxing and wrestling matches at such times and places as they deem just and reasonable. . . .

ORS 463.130. Wrestling matches shall be held only under authority of the commission. No

person other than a person of the male sex shall participate in or be licensed to participate in any wrestling match.

ORS 463.140 (1) The commission shall appoint one or more competent matchmakers who shall arrange boxing matching, and one or more matchmakers who shall arrange wrestling matches. A matchmaker shall be compensated for his services by the commission with such compensation as the commission deems reasonable. . . .

Defendants Engaged in Interstate Commerce

22. The Alliance and its members, including defendant Don Owen, in the conduct of their booking business and related promotions are engaged in interstate trade and commerce. Wrestling matches are performed throughout the United States at various metropolitan centers including the Portland-Vancouver area.

23. The United States Department of Commerce designates as the Portland Metropolitan Area all of Multnomah, Washington and Clackamas counties in Oregon, and all of Clark county in Washington.

Continuity of Interstate Commerce

24. The wrestling businesses of the Alliance and its members, including defendant Don Owen, involve a continuous two-way flow across state lines of posters, advertising copy, trade data, contracts, reports, bills, cash, checks, and written and verbal communications,

and a continuous use of interstate transportation and communication facilities.

25. Motion pictures of exhibitions booked by members, including related promotions, are sold or licensed and distributed to customers located in various states of the United States other than the state of production of such motion pictures.

26. The nationwide interest in exhibitions over television networks by professional wrestlers booked by the members pursuant to agreements and understanding with the Alliance has enabled members to sell, for substantial sums of money, rights to advertise products and services in connection with such exhibitions.

27. Such exhibitions originate from armories, labor temples, coliseums, arenas, stadia and studios located in various states of the United States and are televised and broadcast over the facilities of many television stations located in various states other than the states of origination.

28. Mt. Hood TV under arrangement with defendant Don Owen, acting for himself individually and for and on behalf of the Commission and the Alliance, had broadcast regularly and without interruption since 1953 over its station KOIN-TV, Channel 6, for viewing in the Portland-Vancouver area the Portland wrestling matches promoted by said defendant Don Owen.

29. The interstate communication by television is

not incidental to the exhibition of the matches because the substantial remuneration involved therefrom, as much as $1500 weekly paid by Mt. Hood TV to defendant Don Owen, is a significant portion of the gross receipts resulting from such wrestling performances.

THE COMBINATION AND CONSPIRACY

30. Beginning in or about the year 1950 and continuing without interruption thereafter to the filing of this complaint, defendants and others acting in concert with them violated and are now violating Sections 1 and 2 of the Sherman Act by unlawfully contracting, combining and conspiring to monopolize, monopolizing and attempting to monopolize, and by unlawfully contracting, combining and conspiring to restrain trade and commerce among the several states in the business of professional wrestling and by conspiring to monopolize, control, regulate and dictate the terms upon which organized professional wrestling shall be performed throughout the United States, including the Portland-Vancouver metropolitan area.

31. Heretofore on or about October 15, 1956, a complaint, copy of which marked "Exhibit A" is attached hereto and by this reference made a part hereof as though fully set forth herein, was filed in the United States District Court for the Southern District of Iowa, Central Division, by the United States of America, against the Alliance to prevent and restrain continuing violations by the Alliance of

the Sherman Antitrust Act (15 U.S.C. 1, 2), and on or about October 15, 1956, there was made and entered in said cause and court a comment decree, copy of which marked "Exhibit B" is attached hereto and by this reference made a part hereof as though fully set forth herein, whereby, inter alia, the Alliance and consenting members, including defendant Don Owen, were each jointly and severally enjoined and restrained from entering into, adhering to, promoting or following any course of conduct, practice or policy, or any agreement or understanding, having the purpose or effect of:

(1) Recognizing, approving or designating and booker or promoter as the exclusive booker or promoter in a designated area or territory;

(2) Preventing, restricting or impeding any booker or promoter from doing business in any area or territory;

(3) Restricting or limiting the promotion or booking of wrestling exhibitions to related promotions or to promoters or bookers who are members of defendants, or requiring, requesting or inducing any person so to do;

(4) Requiring, requesting or urging any booker to book wrestling exhibitions only through promoter-members or to discriminate in favor of promoter-members;

(5) Requiring, requesting or urging any promoter to promote wrestling exhibitions only through the services of booker-members or to

discriminate in favor of booker-members;

(6) Requiring, requesting or inducing any person to promote or book any wrestler;

(7) Preventing, restricting or impeding any wrestler, booker or promoter from participating in studio exhibitions or discriminating against any wrestler, promoter or booker because such person participated in the booking or promotion of studio exhibitions.

32. Said unlawful conspiracy to monopolize, and the combinations and conspiracies to restrain trade and commerce in the business of professional wrestling have consisted of a continuing agreement among defendants, the substantial terms of which, and the means of such concert of action, being as hereinafter set forth.

33. Throughout the years until 1950 there were at all times approximately six individuals licensed by the Commission to conduct wrestling promotions and the arrangement of wrestling events or entertainments in the city of Portland.

34. The Commission in or about 1950 reduced the number of wrestling matchmakers to one and has continued ever since that time and up to the filing of this complaint to permit only one wrestling matchmaker or promoter.

35. The Commission has neither adopted nor filed to the date of this complaint any administrative rules with the Secretary of State according to letters of

August 18, 1964, and February 1, 1966, from said Secretary, copies of which marked respectively "Exhibit C" and "Exhibit D" are attached hereto and by this reference made a part hereof as though fully set forth herein.

36. The Commission had actual notice of the consent decree described in Paragraph 31 above and that defendant Don Owen was among the Alliance members who had consented to the entry of the decree.

37. Defendant Don Owen has been the only promoter and matchmaker permitted to operate professional wrestling exhibitions in the city of Portland by the Commission since 1950; Owen conducts wrestling shows every Monday evening at the Labor Temple in the city of Portland, and every Friday evening at the Armory in the city of Portland, retaining for himself the entire receipts therefrom after payment of a percentage fee to the Commission; the Friday evening performances are televised by KOIN-TV for viewing in the Portland-Vancouver area and Mt. Hood TV pays Owen substantial weekly royalties therefor; Owen was among the Alliance members who consented to the entry of the decree described in Paragraph 31 above.

UNCONSTITUTIONALITY OF OREGON STATUTE

(ORS 463.010 et seq. relating to wrestling)

38. The requirements and enforcement of Oregon Revised Statutes, sections 463.010 et seq. as they re-

late to professional wrestling should be enjoined and the statute declared unconstitutional as in violation of the commerce clause, equal protection and due process provisions of the Constitution of the United States of America. In the enactment of the foregoing statutes: there were neither legislative hearings nor findings that wrestling is malum per se; there are no legislative guidelines for regulation of wrestling; there is unlawful delegation of legislative power; there is a restraint of trade through creation of a monopoly in professional wrestling and deprivation of the right of a citizen to engage in such lawful occupation.

APPLICATION FOR THREE-JUDGE DISTRICT COURT

39. Plaintiff hereby makes application for hearing of this cause before a three-judge District Court as required by 28 U.S.C. 2281, and requests that the Chief Judge of the United States Court of Appeals for the Ninth Circuit be notified pursuant to 28 U.S.C. 2284 of plaintiff's application for injunction in order that the necessary designation of Judges for said Court may be made.

BOYCOTTING AND BLACKLISTING OF PLAINTIFF

40. To effectuate said combination and conspiracy, and as a part thereof, defendants throughout the period from mid-September, 1963, to the date of the filing of this complaint, regularly and continuously

did said things which they agreed to do and more specifically, among other things, did the following:

41. On or about the 16th day of September, 1963, Plaintiff applied to the Commission for a license and appointment as a wrestling matchmaker-promoter pursuant to the qualifications set forth by the statutes, ORS 463.010 et seq., arranged for exhibition time at the Portland Memorial Coliseum and professional wrestling talent.

42. The Commission denied plaintiff's application on the 23rd day of September, 1963, on the ground "That the issuance of a second wrestling matchmaker's license at this time would not be in the best interest of wrestling in the Portland area."

43. Plaintiff filed suit against the Commission on February 21, 1964, in the Circuit Court of the State of Oregon for the County of Multnomah to obtain a wrestling matchmaker-promoter license and to restrain the monopoly and discrimination as to professional wrestling in the Portland area. On September 22, 1964, plaintiff filed in said cause and court a second amended complaint, copy of which marked "Exhibit E" is attached hereto and by this reference made a part hereof as though fully set forth herein. Plaintiff declined to plead further after the court

> ORDERED that plaintiff's second amended complaint on file herein be and the same hereby is stricken on the ground and for the reason that said second amended complaint is frivolous in that the material allegations contained therein are repetitious of the amended complaint herein

to which a demurrer was sustained on the ground that same did not constitute a cause of suit and that the remedy sought by said amended complaint was (1) a mandatory injunction requiring the defendant to license plaintiff as a matchmaker, (2) that O.R.S. 463.120 (1) requires the defendant to "* * * appoint one or more matchmakers * * *," and it therefore has no power or authority to license plaintiff as a match-maker, and (3) that the Court has no power to require the defendant to do an act beyond its statutory authority,[1]

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[1]

DEPARTMENT OF THE STATE
Salem 97130

August 18, 1964

Mr. Adelbert G. Clostermann
Attorney at Law
254 Multnomah Hotel
Portland, Oregon 97204

Dear Mr. Clostermann:

Per your request of August 17, I caused the Administrative Rules files to be searched for any filing from any of the boxing commissions described in ORS Chapter 463.

The result of the search proved to be negative. There are no filings from any boxing commission in the State of Oregon in our Administrative Rules files or compilation.

Sincerely,

HOWELL APPLING, JR.
Secretary of State

By:
HAROLD F. PHILLIPS
Assistant

NOTE: Letter dated August 18, 1964 supported plaintiff as evidence in resisting defendant's theory that Administrative Procedures Act applied.

and accordingly the Court dismissed the suit of November 18, 1964. Plaintiff duly appealed the case to the Supreme Court of the State of Oregon which affirmed the trial court in an opinion filed November 17, 1965, copy of which opinion marked "Exhibit F" is attached hereto.

44. The Commission continues to refuse plaintiff permission to conduct professional wrestling exhibitions in the Portland area or to be appointed as a matchmaker to arrange wrestling matches.

45. The Commission and defendant Don Owen control all wrestling talent in the Portland area and

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STATE OF OREGON
DEPARTMENT OF STATE
Salm 97310
February 1, 1966

Mr. Adelbert G. Clostermann
Attorney-at-Law
639 Park Haviland Hotel
Portland, Oregon - 97204

Dear Mr. Clostermann:

I have had the Oregon State Administrative Rules file in this office searched for filings submitted by a Boxing-Wrestling Commission under the provisions of ORS 463.120.

The result of the search was in the negative. As of this date, no filings of subject type could be found.

I trust this is the information you requested. If I can be of any further service, please feel free to call upon me.

Sincerely,

/s/ Clay Myers
CLAY MYERS
Assistant Secretary of State

CM:Lh

have induced such professional wrestlers not to contract with plaintiff for performances and exhibitions.

46. Plaintiff has made repeated requests to defendants to remove the ban, boycott and blacklisting so imposed against him, but defendants have steadfastly refused to do so, and the said boycot, ban and blacklisting remains in effect at the date of filing of this complaint.

EFFECT OF THE COMBINATION, CONSPIRACY AND MONOPOLY IN RESTRAINT OF TRADE

47. By reason of said violations of the antitrust laws, defendants, have injured the business of plaintiff by actively eliminating him from the business of professional wrestling, particularly as a promoter and matchmaker; they have suppressed competition and have monopolized the business of professional wrestling; they have eliminated competition among themselves and prevented new competition; they have effectively prevented competition by plaintiff; they have effectively placed all professional wrestlers within their control in a condition of bondage through use of agreements, verbal and otherwise, among themselves and with the wrestlers.

48. The injury to plaintiff was directly intended by defendants and was caused by the monopolistic practices herein alleged, and said injury resulted in the damaging of plaintiff in the sum of $2700

per week from September 16, 1963, to the date of filing of this complaint. Wherefore Plaintiff prays for judgment and decree as follows:

1. That summons issue to each of the defendants commanding it to answer the allegations contained in this complaint and to abide by such orders as the Court may make.

2. That Plaintiff receive with interest as damages for the injury to his business the sum of $334,800, that said sum be trebled to $1,004,400, and that the Court award a reasonable attorney's fees, in accordance with Section 4 of the Clayton Act (15 U.S.C. 15).

3. That said combination and conspiracy, contracts, agreements, arrangements and understandings in restraint of interstate commerce, conspiracy to monopolize and monopolization of interstate commerce be decreed unlawful, and in violation of Sections 1 and 2 of the Sherman Act.

4. That the Court decree that defendants have combined and conspired to restrain unreasonably and have conspired to monopolize, attempt to monopolize, and have monopolized the interstate trade and commerce in the business of professional wrestling in violation of Sections 1 and 2 of the Sherman Act.

5. That Oregon Revised Statutes, 463.010 et seq., as they relate to professional wrestling be declared unconstitutional and void.

6. That defendants, and each of them, their suc-

cessors in office, servants, agents, employees, representatives and all others acting on their behalf or in concert with them, be restrained and enjoined from enforcing the provisions of Oregon Revised Statutes, 463.010 et seq., as they relate to professional wrestling.

7. That the Court enjoin defendants from boycotting or blacklisting plaintiff in the business of professional wrestling and from interfering in any way with plaintiff in his occupation of wrestling matchmaking and promoter in the Portland area.

8. That plaintiff recover his costs herein.

9. That plaintiff have such other relief as the Court may deem proper.

/s/ *Kurt von Poppenheim*
Plaintiff

/s/ *Adelbert G. Clostermann*
Attorney for Plaintiff

(Acknowledgment Omitted)

EXHIBIT B

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

UNITED STATES OF AMERICA, *Plaintiff,*	)	
v.	)	Civil Action No. 3-729
NATIONAL WRESTLING ALLIANCE, *Defendant.*	)	

FINAL JUDGMENT

Plaintiff United States of America having filed its complaint herein on October 15, 1956; defendant having filed its answer to the complaint denying the material allegations thereof; and plaintiff and defendant by their attorneys having consented to the entry of this Final Judgment, without trial or adjudication of any issue of fact or law herein and without this Final Judgment constituting evidence or an admission in respect to any such issue;

Now, therefore, before any testimony has been taken herein, and without trial or adjudication of any issue of fact or law herein, and upon consent as aforesaid of each party hereto, it is hereby

ORDERED, ADJUDGED AND DECREED as follows:

I

The Court has jurisdiction of the subject matter of this action and of the parties hereto, and the com-

plaint states a claim upon which relief can be granted against defendant under Sections 1 and 2 of the Act of Congress dated July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, as amended.

II

As used in this Final Judgment:

(A) "Defendant" means defendant National Wrestling Alliance, a membership corporation organized under the laws of the State of Iowa;

(B) "Consenting members" means any member of defendant who submits to the jurisdiction of this Court and executes its consent to be bound and obligated by the terms of this Final Judgment;

(C) "Promoter" means any person engaged in sponsoring and presenting professional wrestling exhibitions;

(D) "Promoter-member" means any promoter who is a member of defendant;

(E) "Booker" means any person who, for a fee or commission, agrees with a promoter or promoters for the performance of wrestlers in professional wrestling exhibitions;

(F) "Booker-member" means any booker who is a member of defendant;

(G) "Studio exhibition" means any professional wrestling exhibition at which revenue is derived pri-

marily from the television broadcast or filming thereof;

(H) "Related promotion" means any professional wrestling exhibition in which a booker also acts as a promoter or has a financial interest in addition to a claim for booking fee or commission;

(I) "Person" means an individual, partnership, firm, corporation, association or other business or legal entity.

III

(A) It appearing to this Court, pursuant to Section 5 of the Sherman Act, that the ends of justice require that all members of the defendant be brought before this Court, the members of the said defendant, as consenting members, hereby appear as additional parties waiving the necessity of being summoned and agree to be bound by the provisions of this Final Judgment;

(B) The provisions of this Final Judgment applicable to defendant or to any consenting member shall apply to such defendant or such consenting member, its officers, agents, servants, employees, subsidiaries, successors and assigns and to every person in active concert or participation with any of them who receives actual notice of this Final Judgment by personal service or otherwise.

IV

Defendant is ordered and directed:

(A) To forthwith cancel and void all its existing rules, regulations and bylaws;

(B) To forthwith adopt and enforce bylaws consistent with the terms of this Final Judgment;

(C) To include in any such new bylaws a provision requiring the expulsion of any member who violates this Final Judgment, engages in activities enumerated in any of the paragraphs of Section V of this Final Judgment or violates any rule, regulation or bylaws of defendant designed to comply with this Final Judgment;

(D) To admit to membership upon nondiscriminatory terms and conditions any booker or promoter if the applicant (1) has engaged in the business of booking or promoting wrestling exhibitions for two years or has promoted at least ten exhibitions in one year, (2) is financially responsible, (3) is licensed by any appropriate licensing authority or, where no licensing authority has jurisdiction, is of good moral character and (4) agrees in writing to be bound by the terms of this Final Judgment;

(E) To give to each new member a copy of this Final Judgment, and to specifically instruct each existing and future member that continuation of membership in defendant is dependent upon compliance with the terms of this Final Judgment.

V

(A) Defendant and consenting members are each jointly and severally enjoined and restrained from entering into, adhering to, promoting or following any course of conduct, practice or policy, or any

agreement or understanding, having the purpose or effect of:

(1) Recognizing, approving or designating any booker or promoter as the exclusive booker or promoter in a designated area or territory;

(2) Preventing, restricting or impeding any booker or promoter from doing business in any area or territory;

(3) Restricting or limiting the promotion or booking of wrestling exhibitions to related promotions or to promoters or bookers who are members of defendant, or requiring, requesting or inducing any person so to do;

(4) Requiring, requesting or inducing any booker to book wrestling exhibitions only through promoter-members or to discriminate in favor of promoter-members;

(5) Requiring, requesting or urging any promoter to promote wrestling exhibitions only through the services of booker-members or to discriminate in favor of booker-members;

(6) Requiring, requesting or inducing any person to refuse to promote or book any wrestler;

(7) Preventing, restricting or impeding any wrestler, booker or promoter from participating in studio exhibitions or discriminating against any wrestler, promoter or or booker because such person participated in the booking or promotion of studio exhibitions.

(B) Defendant and consenting members are each

enjoined and restrained from refusing to book for any promoter any wrestler who is available (taking into consideration travel time and costs) and is being booked by such defendant or such consenting member.

Nothing in this Section V shall obligate defendant or any consenting member to book any wrestler for any promoter (1) who is not duly licensed as such by the appropriate licensing authority or, (2) in the case of a promoter where there is no licensing authority, who is not financially responsible.

VI

Defendant is enjoined and restrained from:

(A) Except as required by Section IV herein, fixing, establishing, maintaining or adhering to any term or condition, including specifically any terms or condition stipulating performance payments, under which promoters or bookers shall promote or book any championship or other wrestling exhibition; provided that this subsection (A) shall not prevent defendants from charging promoters of championship wrestling exhibitions, if defendant is requested by the champion to book for him, a certain fixed percentage of the gross receipts of such wrestling exhibitions;

(B) Requiring, requesting, urging, advising or assisting any member to engage in any activity prohibited in any of the paragraphs herein.

VII

For the purpose of securing compliance with this Final Judgment and for no other purpose, and subject to any legally recognized privilege, duly authorized representatives of the Department of Justice shall, upon written request of the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to defendant or any consenting member made to its principal office, be permitted (A) access during the office hours of such defendant or consenting member to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of such defendant or consenting member relating to any of the subject matters contained in this Final Judgment, and (B) subject to the reasonable convenience of such defendant or consenting member and without restraint or interference from it to interview officers or employees of such defendant or consenting member who may have counsel present, regarding any such matters; and upon such request defendant or any consenting member shall submit such reports in writing to the Department of Justice with respect to matters contained in this Final Judgment as may from time to time be necessary to the enforcement of this Final Judgment. No information obtained by the means provided in this Section VII shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department except in the course of legal pro-

ceedings to which the United States of America is a party for the purpose of securing compliance with this Final Judgment or as otherwise required by law.

Jurisdiction is retained for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment or for the modification or termination of any of the provisions thereof, and for the enforcement of compliance therewith and punishment of violations thereof.

Dated: October 15, 1951, William F. Filey, Judge of District Court.

We hereby consent to the making and entry of the foregoing Final Judgment:

Sam Muchnick, St. Claridge Hotel, St. Louis 3, Mo.; Frank Tunney, Toronto, Canada; O. S. Lutterosh, Mexico City; Sam E. Avey, Tulsa, Okla.; Oniell Brown, Kansas City, Mo.; Cal Eaton, Los Angeles; P. L. Pinkie George, Des Moines, Iowa; A. C. Hoft, Reynoldsley, O.; N. W. "Tex" Hager, Spokane, Wash.; Stewart E. Hart, Calgary, Canada; Paul Jones, Atlanta, Ga.; Joe "TooTo" Mondt, New York, N. Y.; Jim Crockett, Charlotte, N. C.; Fred Kohler, Chicago, Ill.; Harry Light, Detroit, Mich.; Mike London, Albuquerque, N. M.; C. P. Coucko Luttrall, Tampa, Fla.; Ignain Martinez, Buffalo, N. Y.; Hugh Nichols, Hollywood; Eddie Quinn, Mont-

real, Canada; Dave Reynolds, Orem, Utah; Karl Sarpolis, Amarillo, Texas; Dennis G. Stacher, Minneapolis, Minn.; Roy Welch, Dyerburg, Tenn.; Billy Wolfe, Columbus, Ohio; Cliff Maupin; Joe Gunther; Max M. Clayton; Rudy Dusek; James A. Whitfield "Billy Lewis"; Al Karaseck; Joe Malcuinez, San Francisco, Cal.; *Don Owen;* Paul Bowser; Morris Siegel; Rod Fenton.

EXHIBIT C

IN THE CIRCUIT COURT
OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

KURT VON POPENHEIM, *Plaintiff,*	)	No. 298-798
v.	)	SECOND AMENDED
PORTLAND BOXING AND WRESTLING COMMISSION, *Defendant.*	)	COMPLAINT IN EQUITY

Comes now plaintiff and for his Second Amended Complaint for cause of suit against defendant alleges:

I

That at all times mentioned herein plaintiff was and is a resident of the city of Portland, State of Oregon.

II

That the defendant, Portland Boxing and Wrestling Commission (The defendant, Portland Boxing and Wrestling Commission hereinafter in this complaint to be known and described as "Commission")

is a duly constituted Commission of the city of Portland, created pursuant to ORS 463.010 et seq as amended by Oregon Laws, 1963, Ch. 426 and by the authority therein delegated to the Mayor of the city of Portland to appoint the members of said Commission pursuant to the following ordinance enacted by the Council of the city of Portland:

> Article 24; Boxing Commission #3-2401—Article 24 added by Ord. #73508 March 18, 1943 and effective Nov. 7, 1942.
>
> Section 3 — 2401 — Certain city officials to render certain services.
>
> The Council finds that by the provisions of OCLA Section 95-2503 and 95-2504 certain functions are to be performed by the Council and certain city officers; now, therefore, the City Officials referred to in said sections are hereby permitted and authorized to exercise the functions therein stated for and on behalf of the State as herein provided. This article shall be effective as of the date of the repeal of Ord. #70779, to-wit: Nov. 7, 1942.

The following members were appointed and are currently holding their offices pursuant to such authority; JACK A. BATTALIA, M.D., Chairman; NICK SCKAVONE, Commissioner; John D. WELCH, M.D., Commissioner; EDWIN FITZPATRICK, Commissioner; ARNOLD C. HARRIS, Commissioner.

III

That the said Commission, among other things, has the authority to appoint and license individuals as matchmakers (commonly known as promoters) for

the promotion of and/or the making of matches pertaining to wrestling events, whether being competition shows or exhibitions for the entertainment of the public and said matchmaker, or matchmakers, have authority to stage said wrestling shows in the conduct of a business for profit and book a party, or parties, to contract (or contracts) both intrastate and interstate therefor, and said Commission, among other things, is permitted by said Act to oversee such events.

IV

That the Commission has authority pursuant to said Act to adopt reasonable rules and regulations for the administration of said Act and conduct of the business of the Commission including the agents, particularly for the administration of the commercialized wrestling sport within said city of Portland and various cities and communities of Oregon. That said Act appears to be the only authority by which said Commission can function with the exception of the limitations imposed by general law and rules of equity also governing the procedures of a public administrative body.

At the time the Commission commenced to function as such approximately in the year 1920 the census of the said city of Portland reflected a population of 258,288. Beginning with the said functioning of the Commission and until the year 1950 there were at all times approximately six individuals licensed by the Commission to conduct wrestling promotions and

the arrangement of wrestling events or entertainments.

And, from and after the year of 1950, or thereabouts, the Commission reduced the number of wrestling matchmakers to one and has continued ever since that time and up to and including the present time to license only one wrestling matchmaker or promoter.

That the Court will be requested to take judicial notice of the population increase within the State of Oregon and the city of Portland since 1920; and that commercial wrestling as a spectator sport has increased public appeal by way of participation, television entertainment and paid admissions.

V

That professional wrestlers, including plaintiff, whose principal occupation and source of livelihood is that of professional wrestling, are compelled to do business through their manager or on their own behalf with said matchmaker-promoter and various cities and communities within the State of Oregon, particularly within the city of Portland on a non-competitive basis as hereinafter and otherwise set forth in this complaint.

VI

That on or about the 10th day of September, 1963, plaintiff applied to the Commission for a license and appointment as a wrestling matchmaker-promoter for the Commission pursuant to the qualifications set forth by the Act. Such application was denied by

the Commission on the 23rd day of September, 1963 on the ground that plaintiff's application "That the issuance of a second wrestling matchmaker's license at this time would not be in the best interest of wrestling in the Portland area."

VII

Plaintiff alleges that the action of the Commission in denying plaintiff's application is arbitrary, capericious and a clear, definite and unreasonable abuse of discretion power and authority; and is designed to and does create an unlawful monopoly in commercial licensed professional wrestling in the territory governed and administered by the Commission. The action of the Commission in denying plaintiff's said application faces the applicant with unfair restraint of his equitable rights and unfair restraint of lawful trade and is further contrary to public policy and in addition thereto to the reasonable application of the general policy power of the State of Oregon and its agencies.

And, further, that the Commission has no set rules, regulations or standards for the purpose of determining the qualifications of promoters of professional wrestling matches or events other than the provisions of the Act.

That said Act in itself omits sufficient feasible standards to guide the Commission in passing upon the licensing, appointment or qualifications of wrestling matchmakers or promoters.

And, further, the action of said Commission in de-

nying plaintiff's application on the asserted ground is beyond the scope, power and intent of said Act.

VIII

That only an intervention of this Court of Equity can aid in protecting the rights of the plaintiff as a properly qualified applicant for the license heretofore mentioned; and to prevent any arbitrary abuse of power and authority in limiting and restricting the issuance of more than one matchmaker license. And plaintiff reiterates, reducing the competition in said industry in the city of Portland and otherwise throughout Oregon, is contrary to public interest to bring and encourage additional competitive and entertainment industry within the city of Portland and otherwise throughout Oregon.

IX

That because of all the allegations herein set forth and the importance of this cause to plaintiff and the general public and all concerned, plaintiff applies for an advanced date for any trial or hearing on this cause on the calendar of this Court.

X

That the defendant Commission does in fact and as a matter of policy in the conduct of its business contributes to and, in fact, does create an unlawful monopoly and unreasonable restraint of a commercial business and should be required to cease, desist and otherwise be enjoined from the course of conduct set forth herein.

XI

That plaintiff has no plain, speedy nor adequate remedy at law and his only remedy is for relief in this Court of Equity in connection with the matters herein set forth.

WHEREFORE, plaintiff prays for a decree as follows:

1. Requiring the defendant Commission to grant plaintiff a license for the purpose of promoting or matchmaking commercial wrestling events.

2. Requiring the defendant Commission to cease and desist in the engaging in any activity under the Act and public policy which would tend, or does tend to contribute—or in fact maintain any monopolistic or discriminatory practice or acts such as are set forth and recited in the allegations of this complaint.

3. Requiring the defendant Commission be enjoined and restrained from entering into, adhering to, promoting or following any course of conduct, practice or policy, or any agreement or understanding, having the purpose of effect of recognizing, approving or designating any booker or promoter as the exclusive booker, promotor or matchmaker within the jurisdiction of the Commission and that the Commission further instruct its agents to adhere to a like procedure and policy.

And for a decree of this Court declaring the rights, duties and obligations of the parties herein.

And for such other further relief as the Court

may deem equitable and just; and for costs and disbursements incurred by plaintiff herein.

/s/ *Adelbert G. Clostermann*
Attorney for Plaintiff

EXHIBIT D

Supreme Court of Oregon

Von Poppenheim v. Portland Boxing and Wrestling Commission.

OPINION

The plaintiff applied to the Portland Boxing Commission for a license to act as a promoter of wrestling matches within the city. The commission denied the license, and the plaintiff sought a mandatory injunction to compel the commission to issue him a license. The trial court dismissed the complaint and the plaintiff appeals.

The defendant commission had, at all material times, authority to appoint one or more matchmakers to perform whatever services might be necessary in supplying Portland audiences with boxing matches. ORS 643.140. The licensing of wrestling matches was mentioned only incidentally. See ORS 463.120. There was, prior to this year, no statutory provision for either the appointment or the licensing of wrestling promoters or matchmakers.

After this suit was dismissed in the trial court, Oregon Laws 1965, ch 200, became effective.

The appropriate section, ORS 463.140(1), as amended, reads:

> "The commission shall appoint one or more competent matchmakers who shall arrange boxing matches, and one or more matchmakers who shall arrange wrestling matches. A matchmaker shall be compensated for his services by the commission with such compensation as the commission deems reasonable."

The foregoing statute appears to vest in the commission a wide discretion in the appointment of matchmakers. The plaintiff's application to this court for mandatory relief must necessarily be governed by the law as it exists at this time.

Construed under the present law, the plaintiff's complaint amounts to nothing more than the assertion that he sought employment as a matchmaker and was not given such employment. He then draws a number of legal conclusions, one of which is expressed in a recital that, in declining to engage his services, the commission acted arbitrarily and capriciously.

For all that appears in the complaint, the commission treated the plaintiff as it would any other applicant for a job as a wrestling matchmaker. The plaintiff now demands employment, and asks the aid of the courts by way of mandatory injunction to compel the commission to employ him. We doubt that it was the legislature's intent to substitute an individual applicant's discretion for that of the commission in this matter. It is likewise not an appropriate function of the courts, on the record now before us, to tell the commission which matchmakers it should employ.

Affirmed.

APPENDIX B

District Court Opinion
(Record 806)

SOLOMON, Judge:

Kurt von Poppenheim (plaintiff) filed an action charging, in vague and general terms, that defendants had conspired to deny him a license to promote wrestling matches in Portland, Oregon, in violation of federal antitrust laws.

I denied defendants' motions to dismiss in order to give plaintiff the opportunity to obtain the information he needed to establish his case. I granted plaintiff extensions of time to submit interrogatories. After several months, I told plaintiff that I could not allow an antitrust case to continue when it was based solely on suspicion. Finally, I directed him to set forth, with specificity, the acts which he claims formed the basis of the conspiracy. I also directed him to list the witnesses who would testify at the trial, and to state generally what he expected them to say. I gave him sixty days to do this.

Plaintiff has failed to comply with this order and defendants have moved to dismiss the action under Rule 41(b) Fed. R. Civ. P. On numerous occasions extending over a period of more than 12 months, I urged plaintiff's counsel to comply with my order and to associate with him counsel possessing expertise in the antitrust field. The case has been

pending for two and a half years, and I issued my order directing plaintiff to specify the basis for his action one and a half years ago. So far he has failed to comply with this order.

Despite the narrowness of defendants' motions. I have examined the entire record, consisting of three volumes of interrogatories, briefs, depositions, and transcripts, to determine whether the plaintiff has any claim against any or all of the defendants. I have examined the authorities upon which plaintiff relies, as well as the case from the Supreme Court of Oregon in which plaintiff sued the defendant Commission. I have also made an independent examination of the law.

Plaintiff has two intelligible contentions. The first is that the members of the Portland Boxing and Wrestling Commission conspired with one or more of the other defendants to prevent plaintiff from obtaining a matchmaker's license. Plaintiff has failed to show any evidence of a conspiracy among the defendants except for a single, isolated, and ambiguous remark alleged to have been made to the plaintiff by one member of the Commission to the effect that plaintiff would never get a license.

Plaintiff apparently believes that the defendants are acting in concert to keep him from staging wrestling exhibitions in Portland, but surmise and suspicion are not substitutes for evidence.

Plaintiff's second contention is that the law authorizing municipalities to designate commissioners

to control boxing and wrestling in the State is void because it does not set out standards for the commissioners to follow in selecting matchmakers or promoters. ORS 463.010 et seq. This claim was determined adversely to the plaintiff in *von Poppenheim* v. *Portland Boxing and Wrestling Commission*, 241 Or. 603, 407 P.2d 853 (1965). It is supported by numerous federal decisions. *Arizona* v. *California*, 373 U.S. 340 (1964); 1 Davis, Administrative Law § 2.04 (1958). In any event, plaintiff's second contention does not raise any federal question and will not support the jurisdiction of this Court.

I believe that before the City of Portland's Boxing and Wrestling Commission or the other defendants should be put to the expense of defending an antitrust action, they are entitled to know the contentions they will have to meet. I am reluctant to dismiss an action without a hearing. I never do it where the complaint states a claim defectively; I will do it only where it affirmatively appears that the plaintiff is unable to make out a claim. I am convinced that here plaintiff cannot make out a claim upon which relief can be granted and that additional time will not solve the problem.

The defendants' motions to dismiss under Rule 41(b) Fed. R. Civ. P. are granted.

/s/ GUS J. SOLOMON
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KURT VON POPPENHEIM, *Appellant,*
vs.
PORTLAND BOXING & WRESTLING COMMISSION, et al., *Appellees.*
No. 23,846

[May 17, 1971]

On Appeal from the United States District Court for the District of Oregon

Before: HAMBLEY and WRIGHT, Circuit Judges, and LINDBERG, District Judge

LINDBERG, District Judge:

This appeal concerns that portion of Rule 41(b) of the Federal Rules of Civil Procedure that authorizes the court to dismiss a plaintiff's action with prejudice for his failure to comply with an order of the court. The appeal is properly before us pursuant to 28 U.S.C. § 1291.

Plaintiff Kurt von Poppenheim is a professional wrestler from Portland, Oregon. Defendants are the Portland Boxing & Wrestling Commission, the individual members of the Commission, the National Wrestling Alliance, Don Owen, Don Owen Sports, Inc., Mount Hood Radio & Television Broadcasting

Corporation, and the National Wrestling Association of America. The Commission is a statutory body which has jurisdiction over all boxing and wrestling matches conducted within its territory. ORS 463.110, 463.120. One of its functions is the appointing of official wrestling matchmakers. ORS 463.140. Defendant Don Owen is the only wrestling matchmaker the Commission has appointed in the Portland area. Defendant National Wrestling Alliance is a national association of wrestling promoters; whereas the National Wrestling Association of America is primarily an association of wrestling commissioners. Defendant Mount Hood Broadcasting owns and operates a Portland television station which periodically has televised wrestling programs promoted by Don Owen.

In September of 1963 von Poppenheim applied to the Commission for a wrestling matchmaker's license in the Porltand area. The Commission eventually denied the application on the stated basis that "the issuance of a second wrestling matchmaker's license at this time would not be in the best interest of wrestling in the Portland area."

Plaintiff promptly filed suit against the Commission in the Circuit Court of the State of Oregon, alleging that the Commission's action was arbitrary and capricious and accomplished an "unlawful monopoly in commercial licensed professional wrestling." He sought a mandatory injunction to compel the Commission to issue him a license. The Oregon Circuit Court dismissed plaintiff's action on the pleadings after

considering an original and two amended complaints. On appeal, the Oregon Supreme Court affirmed the dismissal.[1] 241 Or. 603, 407 P.2d 853 (1965)

Two months later von Poppenheim initiated the present action in the Federal District Court for the District of Oregon. The thrust of his complaint was that the members of the Commission had some time in the past entered into a conspiracy and combination with the other defendants "to restrain trade and commerce among the several states in the business of professional wrestling" in violation of federal antitrust provisions. It also alleged that the state statutes creating and empowering the commission to appoint matchmakers were, for various reasons, unconstitutional. Plaintiff sought treble damages, a declaration that the state statutes were unconstitutional, an injunction preventing the enforcement of these statutes, and an injunction preventing defendants from "interfering in any way with plaintiff in his occupation of wrestling matchmaker and promoter in the Portland area."

Approximately fourteen months after the action was originally filed, the district judge to whom the

[1] The Oregon Supreme Court first held that at the time von Poppenheim had applied to be appointed a wrestling matchmaker the Commission only had the statutory power to appoint boxing matchmakers. It noted, however, that in the interim period between the time of von Poppenheim's application and the hearing of his case on appeal the Oregon legislature had given the Commission responsibility to appoint wrestling matchmakers. ORS 463.140 (1965) Construing plaintiff's application under the new law, the Oregon court held that the Commission's action was not arbitrary or capricious.

case was assigned requested plaintiff to submit a detailed pretrial statement to the court in order to clarify the issues involved in the case. Nearly six months after the statement was due, but not forthcoming, defendants moved for a dismissal under Rule 41(b). The court did not grant the motion, but gave plaintiff further time to submit a satisfactory statement. Plaintiff eventually submitted several statements, but the district judge held that they failed to comply with the requirements of his order. He then granted the defendants' motion to dismiss with prejudice. This appeal followed.

Insofar as it is applicable to this case, Rule 41(b) provides:

> For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. . . . Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision . . . operates as an adjudication upon the merits.

Because a dismissal under Rule 41(b) is such a harsh remedy, and because such dismissals are frequently occasioned by inattention of counsel rather than by plaintiff's own wrongdoing, courts are rightfully reluctant to employ 41(b) sanctions for failure to comply with an order of the court. *Industrial Building Materials, Inc.* v. *Interchemical Corporation*, 437 F.2d 1336, (9th Cir. 1970); *Flaksa* v. *Little River Marine Construction Co.*, 389 F.2d 885 (5th Cir.), *cert. denied*, 392 U.S. 928 (1968); *Syracuse Broad-*

casting Corp. v. *Newhouse*, 271 F.2d 910 (2d Cir. 1959). It is equally clear, however, that aggravated circumstances may make dismissal under 41(b) appropriate. *Agnew* v. *Moody*, 330 F.2d 868 (9th Cir.), *cert. denied*, 379 U.S. 867 (1964); *O'Brien* v. *Sinatra*, 315 F.2d 637 (9th Cir. 1963). In those cases the district judge will be reversed only if he has abused his discretion in dismissing the action. *Industrial Building Materials, Inc.* v. *Interchemical Corp., supra; Blake* v. *De Vilviss*, 118 F.2d 346 (6th Cir. 1941); see *Link* v. *Wabash Railroad Co.*, 370 U.S. 626 (1962); *Russell* v. *Cunningham*, 233 F.2d 806 (9th Cir. 1956).

In the present action, the crux of the problem in the district court was plaintiff's continuing failure to advise defendants sufficiently of the basis of his claim or the facts upon which he was relying to enable them to prepare an appropriate defense. Plaintiff's complaint was prolix, confused and obscure. More important from the defendants' point of view, however, was plaintiff's subsequent inability or unwillingness to narrow the legal issues or set out with any degree of particularity the facts upon which he based the broad and conclusory statements of his complaint.[2] Defend-

[2] The Federal Rules of Civil Procedure do not require a claimant's complaint to set out in detail the facts upon which he bases his claim. All that is required is a short and plain statement of the claim that will give the defendant "fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley* v. *Gibson*, 355 U.S. 41, 47 (1957). Concomitantly, however, it is expected that the Rules' liberal discovery provisions will afford the defendant the opportunity to investigate more precisely the nature and basis of the plaintiff's claim and to define more narrowly the disputed facts and issues. *Conley* v. *Gibson, supra.*

ants deposed and served interrogatories on plaintiff on several occasions. Plaintiff's responses to the critical portions of these discovery efforts were consistently unresponsive. They failed to narrow the scope of inquiry or form a satisfactory base from which defendants could proceed in the preparation of their defense.[3]

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[3] The following excerpt from plaintiff's "Answers to Interrogatories" filed October 25, 1966 is illustrative:

> 18. With reference to Paragraph XXV, starting on Line 1, Page 8, of your Complaint, in what way, if any, are these interrogating defendants connected with the making, licensing or distributing of motion pictures of wrestling exhibitions?
> A. I am unable to presently answer this question.
> 19. What are the arrangements, if any, between the defendant, Mt. Hood Radio and Television Broadcasting Corporation, and these interrogating defendants?
> A. I am not fully informed at the present time.
> * * * * *
> 28. Did these interrogating defendants or any of them individually ever at any time enter into a contract with defendant Don Owen or anyone else setting up a monopoly of professional wrestling by promoter-matchmaker Don Owen within the jurisdiction of the defendant Commission?
> A. Activities suggest some arrangement.
> * * * * *
> 33. Who, among these interrogating defendants, were the parties to the alleged conspiracy?
> A. All.
> 34. On what date was the agreement of the conspiracy reached?
> A. Various dates.
> 35. State the names and addresses of all persons present at the time the agreement of conspiracy was entered into.
> A. Presently unable to answer.
> 36. Was the agreement of conspiracy a written document or was it an oral agreement?
> A. In part.
> 37. If said agreement of conspiracy was a written document and you will do so without a motion to produce,

On April 24, 1967, approximately fourteen months after the action had been filed, plaintiff's counsel advised the district judge that plaintiff's preparation could be "wrapped up for the Court within thirty to sixty days. The district judge then requested plaintiff to file a pretrial statement with the court within sixty days.

> I want a statement of what the conspiracy or conspiracies consist, with specificity, I should add.
>
> Secondly, the names of the witnesses who will give you information concerning the existence of a conspiracy.
>
> And, thirdly, the testimony you believe the witnesses will give.
>
> With reference to point number one, I think you should set out the parties to the conspiracy and the role which each of those parties played.

He also urged plaintiff's counsel to associate with someone who was more experienced with federal litigation, and in particular with antitrust litigation.

When plaintiff failed to prepare a pretrial statement within the sixty days, opposing counsel contacted plaintiff's attorney, reminded him of his duty to file a statement, and urged him to do so promptly. Plaintiff still did not prepare a statement; instead plaintiff's counsel prepared a letter containing informa-

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attach a copy of said document to your answers to these interrogatories.
A. Presently unable to answer.
38. If the conspiracy was oral, state the contents of said agreement in detail.
A. Presently unable to answer.

tion that vaguely followed the contours of the statement requested by the court and sent it to defendant's attorneys. No other efforts to comply with the court order were taken.

Six months passed. During this period defendants' counsel informally contacted plaintiff's attorney and expressed dissatisfaction with the quality of the information contained in the July letter. In December, 1967, defendants finally filed motions to have plaintiff's action dismissed for failure to comply with the court's order. When the motions were jointly argued on January 2, 1968, the district judge indicated that the July letter did not constitute compliance with the court's order because the information contained therein was conclusory, incomplete and otherwise obscure. He did not rule on the motion to dismiss, however, because of the possibility that plaintiff had been under the misimpression that the information contained in the letter was sufficient. The judge allowed plaintiff a period of several more weeks in which to file a statement containing the information originally requested. He made it clear, however, that he expected the statement to be "as full and as specific as possible" and that if the statement was inadequate he would "have no alternative but to dismiss the case."

On February 1, 1968, a statement was filed. In several respects this statement was more expansive than the July letter, but it too failed to set forth with specificity the requested information. Rather than dismiss the case, the district judge granted plaintiff a

further extension of a month within which to submit a presentable document. He again urged plaintiff's counsel to associate with an experienced antitrust attorney.

Plaintiff's attorney again failed to heed the district judge's advice to associate with experienced counsel. Instead, he prepared and presented to the court and counsel for the defendant on March 11, 1968, a new document entitled "Plaintiff's Memorandum and Supplemental Statement." This memorandum was largely a narrative summary made up from documents which plaintiff relied upon to prove his case. The documents themselves were attached to the statement in the form of exhibits. After they were given sufficient time to examine the supplementary statement, defendants renewed their motions to dismiss under Rule 41 (b) and urged the matter before the Court on March 25, 1968. Their main objection was that plaintiff's statements still lacked the specificity required by the Court and necessary to enable them to prepare an intelligent defense. The district judge took the motions under submission, reviewed the entire case, and entered an order granting defendants' motions to dismiss.

This appeal raises two issues: (1) whether the letter and statements, taken singularly or together, did in fact constitute compliance with the court's order; (2) whether, notwithstanding noncompliance, the district judge abused his discretion in dismissing the action with prejudice.

The district judge held that the documents did not comply with his order. Although this determination is reviewable, it is entitled to considerable weight. *Industrial Building Materials, Inc.* v. *Interchemical Corp., supra.* The district judge is in the best position to understand the full content of his order, to assess the efforts to accomplish compliance, and to appreciate the extent that the information actually supplied was helpful in accomplishing the purpose of the order. *Industrial Building Materials, Inc.* v. *Interchemical Corp., supra.* We have reviewed the documents that plaintiff submitted in response to the court's order, and we cannot say that the district judge's determination was erroneous. Plaintiff never did set out a full list of the names of the witnesses he relied upon to establish the conspiracy. He did mention that he intended to rely upon the "testimony and writings" of several of the defendants and their close business associates, but he also indicated his reliance upon "former wrestlers and some others," all of whom remained unidentified. He also failed to set out the nature or substance of the testimony he expected to elicit from any of his witnesses, and his description of the role played by each of the defendants, insofar as their actions were supposed to be illegal, remained imprecise and undetailed. Absent the quality and kind of information requested by the court, the documents were completely inadequate.

Given the inadequacy and untimeliness of plaintiff's statements, however, the issue still remains of whether the dismissal with prejudice was an abuse of

the district judge's discretion. See, e.g., *Industrial Building Materials, Inc.* v. *Interchemical Corp.*, *supra*; *cf. Sykes* v. *United States*, 290 F.2d 555 (9th Cir. 1961). In the analysis of this issue the opinion of the district judge dismissing plaintiff's action is an appropriate beginning point.

> Kurt von Poppenheim (plaintiff) filed an action charging, in vague and general terms, that defendants had conspired to deny him a license to promote wrestling matches in Portland, Oregon, in violation of federal antitrust laws.
>
> I denied defendants' motions to dismiss in order to give plaintiff the opportunity to obtain the information he needed to establish his case. I granted plaintiff extensions of time to submit interrogatories. After several months, I told plaintiff that I could not allow an antitrust case to continue when it was based solely on suspicion. Finally, I directed him to set forth, with specificity, the acts which he claimed formed the basis of the conspiracy. I also directed him to list the witnesses who would testify at the trial, and to state generally what he expected them to say. I gave him sixty days to do this.
>
> Plaintiff failed to comply with this order and defendants have moved to dismiss the action under Rule 41(b) Federal Rules of Civil Procedure. On numerous occasions extending over a period of more than 12 months, I urged plaintiff's counsel to comply with my order and to associate with him counsel possessing expertise in the antitrust field. The case has been pending for two and a half years, and I issued my order directing plain-

tiff to specify the basis for his action one and a half years ago. So far he has failed to comply with this order.

Despite the narrowness of defendants' motions, I have examined the entire record, consisting of three volumes of interrogatories, briefs, depositions, and transcripts to determine whether the plaintiff has any claim against any or all of the defendants. I have examined the authorities upon which plaintiff relies, as well as the case from the Supreme Court of Oregon in which plaintiff sued defendant Commission. I have also made an independent examination of the law.

* * * * *

Plaintiff apparently believes that the defendants are acting in concert to keep him from staging wrestling exhibitions in Portland, but surmise and suspicion are not substitutes for evidence.

* * * * *

I believe that before the City of Portland's Boxing and Wrestling Commission or the other defendants should be put to the expense of defending an antitrust action, they are entitled to know the contentions they will have to meet. I am reluctant to dismiss an action without a hearing. I never do it where the complaint states a claim defectively; I will do it only where it affirmatively appears that the plaintiff is unable to make out a claim. I am convinced that here plaintiff cannot make out a claim upon which relief can be granted and that additional time will not solve the problem.

The defendants' motions to dismiss under Rule

41(b) Fed. R. Civ. P. are granted.[4]

Although we are aware of the serious consequences of the district court's dismissal, we are satisfied after reviewing the entire record that the action of the district judge was within the limits of his discretion. Almost two years after this action had been filed, and almost one year after plaintiff had originally estimated that his discovery was nearly complete, plaintiff had still failed to apprise the defendants of the contentions they were to meet. In these circumstances plaintiff's failure to provide the requested information

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[4] On this appeal plaintiff has obliquely suggested that the district judge's dismissal was in the nature of a summary judgment or dismissal for having failed to state a claim rather than for having failed to comply with the court's order. If such were the case, of course, our standards of review would be quite different. Compare *DeWitt* v. *Pail*, 366 F.2d 682 (9th Cir. 1966) and *Hughes Blades* v. *Diamond Tool Associates*, 300 F.2d 853 (9th Cir. 1962) with *O'Brien* v. *Sinatra*, *supra*. (We would also note in this connection that no motion to dismiss or for summary judgment was before the court.) We have thoroughly examined the entire record in this case to test the merits of plaintiff's suggestion. We are satisfied after this examination that the moving cause of the dismissal was plaintiff's failure to submit an adequate statement to the court and that the dismissal was in fact based upon Rule 41(b).

The district judge was obviously aware of the legal hurdles plaintiff faced in this litigation and of the general quality of proof he relied upon to establish his case. This information, however, was ancillary; it was one of many factors the court took into consideration before determining that dismissal under Rule 41(b) is not grounded on the sufficiency or insufficiency of the merits of a case. However, it is patent that the harshness of a dismissal with prejudice is directly proportionate to the likelihood that plaintiff would prevail if permitted to go forward to trial. Since harshness is a key consideration in the district judge's exercise of discretion, it is appropriate that he consider the strength of a plaintiff's case if such information is available to him before determining whether dismissal with prejudice is appropriate. In the instant case such information was before the district judge.

did not merely make normal progress more difficult. The status of the pleadings and of discovery were such that noncompliance prevented any further progress at all. It is not clear whether plaintiff's failure to make this basic information available was a result of a "conscious and deliberate decision," *O'Brien* v. *Sinatra*, 315 F.2d 637 (9th Cir. 1963), or merely a result of gross inadvertence or inexperience. That issue is not determinative. Plaintiff's failure to comply with the order demonstrated either an obstinate determination not to provide the requested information or, if inexperience was the problem, an impervious unwillingness to follow the advice of the court to associate experienced antitrust counsel. In either case, plaintiff's failure to take reasonable steps to provide the basic information frustrated all hope of molding his case into a justiciable posture.

None of the actions taken by the district judge accomplished compliance. The original order was clear and unambiguous. The information sought was not complex; much of it in fact consisted of listing plaintiff's witnesses and detailing the content of their anticipated testimony. When plaintiff neither timely nor adequately complied with the court's order, the district judge granted him several extensions in time to comply. The total time permitted for compliance was eleven months. During this period the court repeatedly urged plaintiff's counsel to find expert help. He also advised counsel that noncompliance simply was not forthcoming.

In *Industrial Building Materials, Inc.* v. *Interchemical Corporation*, 437 F.2d 1336, this Court recently reaffirmed the position that the sanctions of Rule 41(b) to enforce a court order should only be invoked in extreme circumstances. That decision stressed that less drastic alternatives should first be considered before dismissing an action under Rule 41(b). Notably, under the circumstances of that case, we specifically suggested the possibilities of arranging for substitute counsel or of continuing the proceedings in order to allow plaintiff to come into compliance with a pretrial order. In the present case it is clear that the district judge exhausted both of these alternatives.

There are of course a wide variety of other sanctions short of dismissal that are available.[5] The district judge, however, need not exhaust them all before finally dismissing a case. The exercise of his discretion to dismiss requires only that possible and meaningful alternatives be reasonably explored, bearing in mind the drastic foreclosure to rights that dismissal effects. Here the district judge made such reasonable opportunities and alternatives available to plaintiff that the dismissal was not an abuse of his discretion. Somewhere along the line, the rights of the defendants to be free from costly and harassing litigation must

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[5] See generally, Annotation: Dismissal of Action for Failure or Refusal of Plaintiff to Obey Court Order, 4 ALR 2d 348; Waterman, An. Appellate Judge's Approach when Reviewing District Court Sanctions Imposed for the Purpose of Insuring Compliance with Pretrial Orders. 29 F.R.D. 420 (1961) 3 Moore's Federal Practice Para. 16.19 (2d Ed.)

be considered. So too must the time and energies of our courts and the rights of would-be litigants awaiting their turns to have other matters resolved. The exact point on that line is incapable of exact definition, but we are satisfied that the present case went beyond it.

The judgment of the district court is affirmed.

APPENDIX D

APPELLANT'S PETITION FOR HEARING

TO THE HONORABLE CIRCUIT JUDGES HAMLEY AND WRIGHT and LINDBERG, DISTRICT JUDGE.

Appellant's petitions for in banc reconsideration or rehearing of the judgment* because of the national importance of this decision sterilizing plaintiff's right to earn a living under the Constitution, and antitrust laws, contrary to the public policy.

The petition discloses a denial of rulings on constitutional issues; and a Court imposed requirement that plaintiff disclose his evidence and witness identity by statement, to defendant's satisfaction who control the monopoly alleged in the professional wrestling industry, under the harsh penalty of prejudicial dismissal.

The facts:

Plaintiff's efforts to engage in business controlled by defendants* hostile to his efforts since 1962 has been denied a Court requirement of evidence and witness disclosure enabling the Court to predetermine the present evidence and provide defendant's information for trial preparation. Plaintiff contends the dismissal was an improvident exercise of the court's process by imposing on a private litigant

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* Less appendix.

requirements inconsistent with the anti-trust laws, and his substantive right to a jury trial. Resume of plaintiff's efforts to be licensed is set forth in Apx. B, p. 23), and Appellant's Brief, p. 3 et seq.

(1) The District Judge erred by dismissing a complex anti-trust wrestling suit on defendant's motion where the Court's ruling on constitutionality of State statutes and city ordinances regarding wrestling business was pending to be heard following lodging of pre-trial order (R. 226).

Where defendants in concert and paralled action deny to citizens the right to compete in a lawful entertainment business* by denial of license, appointment or "what is it" to citizens seeking to exercise his right to make a living is a denial of the 14th Amendment and the Constitution of Oregon. "A state court cannot sterilize a federal claim by putting on the adjudication a local label," *Angel* v. *Buffington*, 330 U.S. 183, 190. Nor can a state deny privileges and immunities to persons that shall not equally belong to all citizens on the same terms, *White* v. *Holman*, 44 Or. 180, 72 P. 933. The right to work is constitutionally protected, *Truax* v. *Raich*, 239 U.S. 33, 41, *Yick Wo* v. *Hopkins*, 118 U.S. 356.

The denial to be heard on constitutional questions is a denial of due process, the Court avoiding a substantive right to plaintiff and favoring the monopoly approved promoter in a monopoly approved territory. Plaintiff being powerless to enter the market without the approval of powerful interests.

(2) The Court erred by denying substantive rights to plaintiff in the guise of procedural rules requiring plaintiff to divulge evidence and witness identity to defendants prior to trial under Rule 41 (b) penalty.

The gravaman of the complaint is one of concerted wrongful deprivation of the right asserted, to pursue a calling, *Parker* v. *Lester* (9 Cir. 1955) 252 F.2d 708; *Truax* v. *Raich*, 257 U.S. 312. The claim of the federal right specifically sets up anti-trust violations, *Rogers* v. *Alabama*, 192 U.S. 226, 230.

The excessive use of the rule by instigation of defendants possessed of the facts they seek, is an abuse of the rule, the court thereby supporting the monopoly, foreclosing plaintiff's disclosures. Even when a bill of particulars was available, the names of witnesses were not required to be disclosed, *Stefanich* v. *Boland* (D.C. N.Y. 1942) 2 F.R.D. 110; nor can the rule serve to elicit evidence and witness identity, *U.S.* v. *Empire Hat & Cap Mfg. Co.* (D.C. Pa. 1942) 47 F. Supp. 395.

The State's denial of relief, under a procedural ruse, converts the alleged unlawful conspiracy into state action, the Court then lending itself to the monopoly. The agreement to exclude petitioner then becomes a conspiracy to work and a deprivation of the laws or of equal protection, *Collins* v. *Handyman*, 341 U.S. 651, 662.

Plaintiff possesses a 7th Amendment right to have his evidence heard by a jury, and a 5th Amendment right not to be deprived of his property without due process of law.

That a rule 41 (b) dismissal is improper, see *Societe International* v. *Rogers*, 357 U.S. 206, and the Constitution limits the power of the Courts process, *Hammond Packing Co.* v. *Arkansas*, 212 U.S. 322.

(3) Where plaintiff in good faith has complied with Court's demand or witness identity and evidence, on three occasions, the Court erred in dismissal, and prejudging merits prior to jury trial.

The record reveals compliance with the court and defendant's demands variously outlining plaintiff's position, and defendants illicit monopoly from their own writings admitted under Rule 36. The disclosure of witnesses within the framework of the monopoly will subject them to economic hardship, the monopoly possessing power of employment and cicensing.

The complaint provides ample information to defendants, with the statements and evidence to have sufficient information for legal purposes. They are subjected to a government consent decree. Their writings, chronicles, and interrogatory admissions support allegations of the monopoly, and conspiracy through a concert of action and parallel relationship, see Appellant's Brief p. 14 et seq.

Actual details in anti-trust suits are in most instances proven by circumstantial evidence and the usual facts are not possessed by persons outside the combination, *Makan Amusement Corp* v. *Trenton-Theaters*, (D.C. N.J. 1944) 3 F.R.D. 429.

CONCLUSION

The opinion is clearly against the facts and the law and in effect supports an illegal monopoly tortiously depriving a person from engaging in a lawful business without a due process hearing. It appears the Court was a victim of its own processes.

The judgment should be reversed, permitting plaintiff to complete his court interrupted discovery and submit the adequacy of his proof to a jury.

Respectfully submitted,

ALBERT G. CLOSTERMANN
Attorney for Appellant.

APPENDIX E

ROLES OF WRESTLING MONOPOLY DEFENDANTS

That the nationwide monopoly of professional wrestling is participated in and effected by the various "licensing" agencies including the defendant Commission: See defendant Battalia's statement as to the grounds for denial of plaintiff's license resulted from a Commission survey nationwide, that it would harm the local promoter and that is the reason the license is given to a favored promoter (R. p. 567). For survey responses see documents (R. pp. 883-886, 898).

That the Commission exerts authority to include or change competitive TV wrestling shows so that the integrity of the local promoter is guaranteed see sample documents (R. pp. 860, 864, 874, 876, 877, 895).

The Commission assures the integrity of the Alliance territory allocation between various promoters, with particular reference to Owen. See sample correspondence (R. pp. 887-889). That the Commission acts on behalf of the Alliance to circumvent Anti-trust law as a municipal regulatory body see documents (R. pp. 887, 888, 889).

Commission minutes reflect refusal to license another promoters (R. pp. 874-882). That it is the Commission policy to deny out of state wrestling interests

TV time in Protland and upholding the territory of the local promoter seee (R. p. 895).

The promoter-matchmaker Owen receives no salary from the Commission nor is he an employee (R. p. 641). Commissioner Sckavone handles the wrestling problems (R. p. 653).

The Commission is a member of the defendant Association (R. p. 662) and other participating members are identified, that various members of the defendant commission are members of the Association (R. p. 665) and that commissioner Sckavone and Commission secretary Yerkovich are Association members. Suspensions are sent to the Association secretary for publication in the newsletter (R. p. 667) and distributed to all members, by mail.

That the Association is a voluntary association of separate legally constiuted commissions (R. p. 673).

That members of the Association act as Commissioners in controlling wrestling, seeing that suspensions are controlled and making certain that the promoter-matchmakers are licensed to operate and participate in territories of members (R. p. 865) and by working together this can be achieved. This statement was made at the time individual defendant Battalia was Chairman of the defendant Commission and concurrently President of defendant Association.

Similar expressions of the Association are documented as to control of wrestling and territorial ineegrity of the promoter, see documents (R. pp. 866-873).

The Alliance is an association of nationwide wrestling promoters and BY-LAWS admitted herein reveal it to be subject to anti-trust conscent decree. *United States of America* v. *National Wrestling Association*, United States District Court, Southern District of Iowa, Central Division No. 3-729 (R. pp. 143 at 146) 1956 *Trade Cases* 68.507. The BY LAWS control the member conduct in wrestling promotions (R. pp. 143 et seq.). Sam Muchnick, wrestling promoter, St. Louis, Missouri, is president (R. p. 678).

The Alliance upholds the rules of the Commissions (R. p. 685); that Don Owen promotes in Oregon and Elliott in Washington (R. p. 682). Contracts are arranged between various wrestlers by telephone (R. p. 680).

Mr. Muchnick denies knowledge of the Association purposes (R. p. 685). Association records reveal his membership (R. p. 664).

Alliance President Muchnick informed city attorney Crofoot "that a municipal body is not subject to anti-trust laws" (R. p. 887) and provided him with a copy of the consent decree.

Correspondence between Alliance and Owen details their activities, Owen reports to the Alliance and utilization of wrestling talent inter-state with great specificity (R. p. 329), correspondence file identified (R. p. 331, 334) and correspondence in detail R. pp. 335-470).

Owen admits he pays the Commission a $25.00 an-

nual license fee (R. p. 304). He does not know the qualifications for "matchmaker." He earlier denied (R. p. 308) and later admitted booking and promoting in Hawaii (R. pp. 688-690). That he was first licensed in Portland in 1942 (R. p. 303). He has been the only person conducting wrestling shows in Portland since 1956 (R. p. 308). He denies knowledge of any change in his license or status since he was originally licensed (R. p. 312). He is a member of the Alliance and Association (R. p. 315). He identifies members of the Alliance (R. p. 317) and that wrestlers are paid in cash (R. p. 325).

Owen obtained Alliance ruling on a Von Poppenheim bout by telegram from the Alliance (R. pp. 337-338). He reports to the Alliance (R. pp. 340-345, 354, 365, 367, 370, 374, 375, 376, 381, 382, 387) and telegram regarding Francis bookings in Hawaii (R. p. 384). Similar expressions of Alliance activities continued to end of correspondence (R. p. 470).

Owen sends Alliance checks of 4% (R. p. 341) and cooperates with the Commission (R. p. 340). Owen uses and books talent in Oregon, Washington, Vancouver, B.C. (R. p. 342). Owen had Washington set up good once (R. p. 343). Bookings are inter and intra-state (R. p. 346). Owen is concerned with application of consent decree, "since I only work for the commission" (R. p. 347); and Owen is conversant with consent decree (R. pp. 349-350). Owen is concerned about his territory and keeps boys going around northwest (R. p. 359).

All territories are down and could use champ in Portland, Seattle, Salem, Medford, Spokane, Eugene (R. p. 363). Muchnick wants wrestling information (R. p. 365). Owen alternates talent in Hawaii, Washington (R. p. 368). Business is fair, Francis has Hawaii, Owens sent White Wolf to him, and Francis is sending Owen some boys (R. p. 371). Owen refers to his little territory and TV tapes competing with him, wrestling business and every one trying to get license in Portland (R. p. 373). Report of wrestling conditions to Alliance (R. p. 374). Concerned about tapes from San Francisco hurting me in Portland (R. p. 377) and hurting business. Owen will fly in Prince Kunio from Hawaii (R. p. 379) and requests pictures from Alliance. Refers to business and "big-terrritories" and Seattle and Portland are about the only two good sized towns we have (R. p. 381). Owen is a loyal member of the Alliance (R. p. 386). Association recognizes Alliance's champion (R. p. 388). Owen receives bookings from Alliance and publicity (R. p. 389) and disposition of talent (R. p. 399). Owen reports on earnings and Alliance percentage (R. p. 395). Owen refers to his whole territory (R. p. 415). Alliance requests reports on various towns (R. p. 416) and checks received. Owen supposed to own Washington (R. p. 438). A portion of Owen Portland earnings (Armory only), are set forth (R. p. 121-126).

Defendant Mt. Hood has regularly televised interstate (R. p. 765) the Owen shows for about 13 years prior to the commencement of this suit (R. p. 751)

and paid Owen $108,967.00 for the exclusive rights to his shows between July 9th, 1956 and January 31, 1966. It provided announcers with wrestling expertise (R. p. 751 and R. p. 857). Owen provided wrestlers for TV interviews and advertising and Owen provided the shows (R. p. 753). Mt. Hood had no comparable competition during this period. The Commission effectively eliminated competitive TV wrestling shows (R. pp. 860-864, 875-877, 884-886, 895).

APPENDIX F

CONSTITUTIONS

Art. VI United States Constitution:

This Constitution and the Laws of the United States which shall be made in pursuance thereof, ———shall be the supreme Law of the Land, and the Judges in every State shall be bound thereby, anything in the Constitution of the laws of any State to the Contrary notwithstanding."

5th Amendment:

". . . nor be deprived of life-liberty or property, without due process of law; . . ."

14th Amendment:

". . . No State shall make or enforce any law which shall abridge the privileges or immunities citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Oregon Constitution Art. I, Sec. 20:

"Equality of Privileges and Immunities of Citizens. No law shall be passed granting to any citizen or class of citizens privileges or immunities which upon the same terms, shall not equally belong to all citizens."

APPENDIX G

FEDERAL STATUTE

15 U.S.C. § 1:

Trusts, etc, in restraint of trade illegal; exception of resale price agreements; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal; *Provided,* That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further,* That the proceeding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between

manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647, § 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693; July 7, 1955, c. 281, 69 Stat. 282.

Monopolizing trade a misdemeanor; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647, § 2, 26 Stat. 209; July 7, 1955, c. 281, 69 Stat. 282.

15 U.S.C. § 15:

Suits by persons injured; amount of recovery

Any person who shall be injured in his business

or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount of controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. Oct. 15, 1914, c. 323, § 4, 38 Stat. 731.

EXHIBIT A

Federal Rules of Civil Procedure.

Rule 41 Dismissal of Actions

(b) Involuntary Dismissal: Effect Thereof.

For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the tion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for

dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue or for lack of an indispensable party, operates as an adjudication upon the merits. As amended Dec. 27, 1946, eff. March 19, 1948; Jan. 21, 1963, eff. July 1, 1963.

APPENDIX H

APPLICABLE OREGON STATUTES

ORS 463.031, Boxing and wrestling matches under jurisdiction of a commission. No boxing or wrestling match shall be held without the consent or beyond the jurisdiction of a commisison.

ORS 463.010, Chapter definitions (2) As used in this chapter, unless the context clearly requires otherwise, "match" means any and every boxing or wrestling match or bout, whether exhibition or competition.

ORS 463.120, Jurisdiction and functions of commossions: (1) The commissions shall have jurisdiction over all boxing and wrestling matches within the county in which they are located. . . . (3) The commissions may: (a) at all times make rules and regulations not in conflict with this chapter under which all boxing and wrestling matches shall be conducted including but not limited to, the payment of participants. (b) license referees, managers, boxers, wrestlres and seconds and collect such fees as they deem just and reasonable (c) hold boxing and wrestling matches at such times and places as they deem right and proper.

ORS 463.140, Appointment of matchmakers and officials for match. (1) The commission shall appoint . . . one or more matchmakers who shall arrange wrestling matches. A matchmaker shall be compensated for his services by the commission with such compensation as the commission deems reasonable.

See also Apx. A, Ex. A, p. 48 et seq.

APPENDIX I

CURRENT PROMOTERS OF PROFESSIONAL WRESTLING in the UNITED STATES as of FEBRUARY 1, 1968

(a) Alliance Member 4-18-66
(b) Association Member 9-66
(c) Signed Consent Decree

*Metropolitan Area**	*Population*	*Promoter*	*Television*
New York (5 NYC counties and Nassau, Suffolk, Rockland, Westchester)	11,410,000	(b) (c) Joe "TooTo" Mondt	
Pittsburgh	2,375,000	(b) (c) Joe "TooTo" Mondt	
Los Angeles, Hollywood	6,789,000	(c) Cal Eaton	
Chicago	6,732,000	(c) Fred Kohler	
Philadelphia	4,690,000	(b) Roy Fabiana	
Detroit	4,060,000	(c) Harry Light	CKLW-TV-9
San Francisco, Oakland	2,958,000	Roy Shires	
		(c) Joe Malcuinez	
Washington, D. C.	2,615,000	(b) Vince McMahon	
St. Louis and Cleveland	2,284,000	(a) (b) (c) Sam Muchnick	KPLR-TV-11
		(b) Larry Atkins and Sam Muchnick	
Baltimore	1,980,000	Ed Contas	
Newark	1,862,000	Willie Gilzenburg	
Houston	1,740,000	(a) (c) Morris R. Sigel	
		(b) Frank Burke	
Minneapolis	1,629,000	(c) Denis G. Stacher	WTCN-TV-5
Cincinnati	1,353,000	Les Ruffen	WCPO-TV-9
Dallas	1,352,000	Ed McLenore	KRLD-TV-4
Milwaukee	1,331,000	(b) Joey Sanger	
Buffalo	1,323,000	(b) (c) Pedro Martinez	
Tulsa		(a) Leroy McGuirk	
Albuquerque		(a) (c) Mike London	
Tampa		(a) (c) C. P. Coucko Luttrall	
Orem, Utah		(c) Dave Reynolds	
Amarillo		(a) (c) Karl Sarpolis	KVII-TV-7
Nashville, Tenn.		(b) (c) Roy Welch	
		(a) (b) Nick Gulas	
Columbus, Ga.		(a) Fred Ward	
Portland, Oregon		(a) (b) (c) Don Owen	KOIN-TV-6
Spokane		(a) (b) Harry Elliott	KHQ-TV-6
Seattle		(a) (b) Harry Elliott and Rod Fenton	KIRO-TV-7
Vancouver, B. C.		(a) (c) Rod Fenton	
Tacoma, Olympia		(b) Cliff Olson	KTVW-TV-13
Honolulu		(b) Ed Francis	TV-4
Toronto		(a) (c) Frank Tunney	
Calgary		(c) Stewart B. Hart	
Montreal		(c) Eddie Quinn	
Mexico City		(a) (c) O. S. Lutteroth	
Indianapolis		(b) Balk Estes	WTTV-TV-4
Ft. Wayne		(b) Phil Olofson	
Richmond, Ind.		(b) Matt F. Mercuris	
Angola, Ind.		(b) Harry K. Smythe	
Canton, Ohio		(b) Harry Friedrich	
Owensboro, Ky.		(b) J. Richardgau	
Louisville, Ky.		(b) Willie Davis	
Jackson, Tenn.		(b) Aron B. Robinson, Jr.	
		(b) John Regus	
Raleigh, N. C.		(b) J. R. Murnick	
St. Joseph, N. C.		(a) (b) Gust Kerros	KFEQ-TV-12
Miami Beach		(b) Chris Dundee	
Lafayette, Ia.		(b) Harry Romero	
El Paso		(b) Dr. Raymon Gardea	
Kansas City		(a) George Simpson	WDAF-TV-4
Des Moines		(c) P. I. Pinkie George	
Reynoldsburg, Ohio		(a) (c) A. C. Heft	
Atlanta		(a) Paul Jones	
Charlotte, N. C.		(a) (b) (c) Jim Crockett	

* Census bureau provisional estimates of population as of 7/31/66 (figures released Oct. 31, 1967).

PORTLAND OREGONIAN
Friday, June 11th, 1971

Making the dollar

Wrestling business more than bruises

By GERRY PRATT
of The Oregonian staff

The one column headline, page eight of the sport section, read: "Funk retains mat crown." The single column story below related how the police crashed into the wrestling arena out in North Portland to rescue the referee from the two irate wrestlers who felt that one of them should have beaten Funk. Ostensibly, they were unhappy with the referee's performance.

It was modest coverage for such a crisis; 'even the cops crashed the wrestling act,' the story began. But a probe of the sport department for information on who covered the matches and the police melee brought only the raising of skeptical sport writer eyebrows. "We thought of sending Ted Mahar, (the Oregonian's drama and movie critic)" said one wag back there among the jungle of record books, blackboard baseball scores and sporting aroma which gives that room its integrity.

TONY BORNE

But the truth is the reporter was Don Owen, who says of himself: "I am not a wrestling promoter, I am the matchmaker for the Portland Athletic Commission."

That is a fine technicality. In addition to his journalistic responsibilities, Don Owen pays the wrestlers, owns the converted bowling alley where the matches are held, arranges the fights and pays the referee, who in this instance happens to be a wrestler who doubles as a real estate agent by day and whose name is Tony Borne. "Tony," Owen explained earlier "was too bruised up for me to use on the card so I used him as referee." According to matchmaker Owen's own estimates, Tony Borne received about $100 for the night's work, about the same amount as the preliminary wrestlers.

The champion Funk got 15 per cent of the gross gate, "after we pay the commission 6 per cent off the top," Owen explains. Owen talks everything in percentages, as much as 15 for the main attraction down to 5 or 6 per cent for other participants. The cost of the card can run him as much as 80 per cent of the gate, "though we cannot do much of that and stay in business," he says.

He is very serious about this business of his, this Mister Owen. He says when skeptics sound off about how phony the wrestling matches are in conversations with his brother, who promotes matches in downstate towns, his brother sometimes gets so mad he socks somebody. There is enough intensity in Don Owen's voice to imply that he also might get angry if you make fun of the wrestling matches. He is a trim man for his 58 years and even in his Louis Roth plaid suit there is the trace of the fight ring about him.

"I used to fan fighters when I was eight years old," he says. Those were the days when his father was promoting fighters and fights" and shouting at them from the ring corners to get up and how to whip somebody whom most of the time they couldn't," Owens says.

It is easy to understand Don Owen's serious approach to wrestling. Last year he put on 70 bouts for the Portland Athletic Commission and drew, he estimates, an average of 2,000 fans a fight or more exactly, better than a 150,000 paid patrons.

Wrestlers take precedence

The prices start at $2.50 for general admission and go to $3 reserved, except for "specials" such as the midweek Funk match where he tacks on an extra buck or so; everything half price for kids. Even at a $2 a head average that comes to a lot of money for the year with 150,000 fans. In St. Louis, where Dory Funk does most of his wrestling according to the Wall Street Journal, the "promoter" averages $25,000 gross per fight 16 times a year. In New York's Madison Square Garden they often draw 20,000 fans and an average gross of $80,000, a fact that prompts Don Owen to recall that Jack Dempsey once said he had made more money in the wrestling ring (refereeing) than he ever did boxing.

Dempsey happened to be one of the finer moments in Owens' own career. He brought Dempsey into Oregon on the comeback trail he recalls, and drew better than 8,000 paid. He also promoted world champion Henry Armstrong into Multnomah Stadium during the depression and cleared about $100 on a mammoth crowd. "That's when I told my dad if you got to work this hard to make that kind of money, let's get out of the business."

But Don Owen didn't get out of the business. He merely gave up prize fighters for prize wrestlers and an-every-Saturday-night date with what he says are 150,000 television fans and some 2,000 paid customers in his bowling alley.

Owen does not get anything but the "publicity" from the TV coverage; the station gets the used car advertisers who find the audience to their liking.

While he bristles visibly at the suggestion that the matches are less than real, "just take a look at the injuries," Owens' own appraisal falls short of stating there is no arrangement between the contestants.

"Action, lots of action," he says at one point, "that's what it takes." And if a wrestler has developed some theatrics, well that is nothing more than the advent of lace panties at a Wimbledon tennis match. "Showmanship," he says and waxes enthusiastically over the likes of a Crusher Stasiak from Canada who wrestles for him, and a Lonnie Mayne, who he says he flew over from Hawaii for a preliminary match this week.

No matter what the gate, Owens insists, "I feel a wrestler is entitled to take home $100. We bend over backward to pay these guys as much as possible. I don't want to sound like I'm 'poopin' my own horn, but we are one of the best payoff promoters in the business. There's no contract. I dont remember ever signing a contract in my life."

Yet Owen says he pays the hospital bills of wrestlers injured on his card and sees they get a decent take home even on nights like the Merrykhana parade, when the gate didn't meet the overhead. "June is my worst month," he says. "I take my lickin' though. Maybe I'll make it back next week."

But that's all in the match making, he admits. "You give them one of those clean matches and it don't draw flies at the gate." But a match with "the bluecoats storming into action" to protect a bruised up Tony Borne, on leave from his real estate office, why that's where a matchmaker might recover. Especially if there's a rematch.

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SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
NOV 26 1971
E. ROBERT

In the Supreme Court
of the United States

OCTOBER TERM 1971

No. 71-612

KURT VON POPPENHEIM,

Petitioner,

v.

PORTLAND BOXING & WRESTLING COMMISSION; JACK BATTALIA, NICK SCKAVONE, JOHN D. WELCH, EDWIN FITZPATRICK & ARNOLD C. HARRIS, individually and as members of the Portland Boxing & Wrestling Commission;

NATIONAL WRESTLING ALLIANCE, an Iowa Membership Corporation; DON OWEN, individually and as resident agent-member of the National Wrestling Alliance;

MOUNT HOOD RADIO & TELEVISION BROADCASTING CORPORATION, a Delaware corporation, NATIONAL WRESTLING ASSOCIATION OF AMERICA, INCORPORATED, and DON OWEN SPORTS, INC., an Oregon corporation,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Judge, United States District Court for Oregon is unreported but is set

forth in the petition as Apx. B at p. 82. The opinion of the Court of Appeals is reported at 443 F.2d 1047 and is set forth in the petition as Apx. C at p. 85.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED

The propriety of the dismissal of an action pursuant to the provisions of F.R.C.P. 41(b) when the plaintiff over a long period of time failed to comply with the order of the District Court to file a statement regarding witnesses and their expected testimony. The order for the statement was entered after discovery procedure failed. Should issues not decided by the Court of Appeals be considered by this Court?

RULE INVOLVED

F.R.C.P. 41(b).

STATEMENT OF THE CASE

The 14-page original Complaint in the case alleging, in very general and broad terms, the existence of a conspiracy and monopoly by the defendants, was filed on February 4, 1966.

After prompt answers by the defendants, each of them launched upon rather vigorous discovery procedures in an effort to learn the real issues in the case

and what real contentions would have to be met. After extensive discovery procedure and 14 months after the case was filed, defendants were frustrated in attempting to learn any facts on which the alleged monopoly and conspiracy were based. After being informed of the circumstances and making his own investigation of the posture of the case, the trial judge issued the following order:

> "I want a statement of what the conspiracy or conspiracies consist, with specificity, I should add.
>
> "Secondly, the names of the witnesses who will give you information concerning the existence of a conspiracy.
>
> "And, thirdly, the testimony you believe these witnesses will give.
>
> "With reference to Point Number 1, I think you should set out the parties to the conspiracy and the role which each of these parties played. * * *"

The statement was due to be filed by the plaintiff in 60 days. Nearly 90 days later, and after a reminder from counsel for a defendant, counsel for plaintiff wrote a letter to the one counsel for defendant setting forth the names of the defendants and describing their general business activities. Five months later (December, 1967) when plaintiff had done nothing further to comply with the order, defendants moved for involuntary dismissal under the provisions of F.R.C.P. 41(b), 28 U.S.C. 41.

Subsequent to the filing of and argument on the

motion, plaintiff was again given opportunity to and did file two more statements, the last one on March 11, 1968.

The trial judge then took the motion and the entire case under advisement. About six months later, on September 16, 1968, the motion for involuntary dismissal was allowed and the case was dismissed.

An appeal to the United States Court of Appeals for the Ninth Circuit was taken. That Court confined itself to the only issue that could be raised at that time (dismissal under Rule 41 (b)), notwithstanding the brief of plaintiff was devoted in large part to argument on the merits of the allegations in the Complaint.

On May 17, 1971, the Court of Appeals issued its opinion affirming the decision of the District Court in dismissing the case pursuant to Rule 41 (b) on the grounds that plaintiff had not complied with the order of the District Court. The Court of Appeals found that the dismissal was not an abuse of discretion, but rather that such dismissal was clearly warranted under the circumstances of the case.

ARGUMENT

United States Supreme Court Rules, Rule 19, states that a review on writ of certiorari will be granted only where there are special and important reasons therefor. While recognizing they are not controlling of the discretion to be exercised, the rule does indicate the character of reasons which will be con-

sidered in exercising that judicial discretion. A review of the petition in comparison to the character of the reasons for which certiorari will be granted is as follows:

Petitioner at pp. 16 and 22 of the petition cites *Von Poppenheim* v. *Portland Boxing and Wrestling Commission*, 241 Or 603, 407 P2d 853, but he does not anywhere in the petition assert the opinion by a state court decided a federal question. At any rate, the Oregon case was decided in November, 1965, and an attack on that case is not now timely.

There is no assertion in the petition that the decision of the United States Court of Appeals for the Ninth Circuit is in conflict with the decision of another Court of Appeals, nor is there an assertion there was an important state or territorial question decided in conflict with state or territorial law, unless it can be said the petition is claiming the six-years-old state case adverted to above is such a conflict; but that was a state decision.

The petition does not claim the questions of law decided by the Court of Appeals in this case have not been settled by this Court. Those questions have, in fact, been spoken to by this Court, see *Link* v. *Wabash Railroad Co.*, 370 U.S. 626 (1962). And there is no assertion the decision of the court below is in conflict with decisions of this Court. There is no claim there is a need for this Court to exercise supervision over the lower courts involved.

Most of the petition is devoted to pages and pages

of rehashing the contents of the jumbled original Complaint calling the defendants monopolists and conspirators. This is all conjecture or a figment of the imagination of petitioner, as there is no evidence in the case, after more than a year of discovery procedures of any monopoly or conspiracy. There are a number of false statements contained in the argumentative "STATEMENT OF THE CASE" and in the argument in support of the "REASONS FOR GRANTING THE WRIT." Without going into detail, suffice it to say much of the material of Apx. E is lifted from context but replete with misleading innuendos.

Throughout the petition there runs the thought the statement of witnesses and expected testimony ordered by the District Court on April 24, 1967, had to satisfy the defendants. This simply is not true. The Court originally set 60 days as the period of time for compliance, in other words the filing of the required statement. However, it was more than 11 months later that the final statement of plaintiff was filed and then the Court took the matter under advisement and studied the entire record for a period of six monhs before reaching a decision. It is absurd to say or imply the statement must necessarily have satisfied defendants.

Adverting to and including in the petition the consent decree of the United States District Court for the Southern District of Iowa, Central Division, is highly improper. Notwithstanding the impropriety, it must be assumed the Department of Justice would

take appropriate action under the provisions of the decree if any of the terms had been violated.

Petitioner's brief in support of his appeal to the Court of Appeals was similar to the petition herein in that it contains many pages calling the respondents monopolists and conspirators and speaking in broad, general terms about monopolies and conspiracies, and like the petition herein and the "statements" filed in the trial court, there were no specific dates mentioned, no people named or acts described of any actual person or persons in connection with any actual monopoly or conspiracy. The Court of Appeals, however, was able to glean two issues from the brief.

> "This appeal raises two issues: (1) Whether the letter and statements, taken singularly or together, did in fact constitute compliance with the court's order; (2) whether, notwithstanding noncompliance, the District Judge abused his discretion in dismissing the action with prejudice." See Petition Apx. C, p. 85 at p. 93.

The Court of Appeals found that the documents did not comply with the order of the trial court. The Court of Appeals also found that the sanctions of Rule 41 (b) to enforce a court order should only be invoked in extreme circumstances and upon a review of the entire record those circumstances were found to have existed in this case. See Petition Apx. C, pp. 99-100.

It is to be noted the petition is devoted almost in its entirety to argument on the merits of the allegations contained in the original Complaint, with some

little attention being given to constitutional questions and even less attention to the one issue that could be legitimately raised, dismissal of the case pursuant to the provisions of F.R.C.P. 41(b), 28 U.S.C. 41. The petition for certiorari is not the time nor place for argument of the merits of the case. U. S. Supreme Court Rule 23, 28 U.S.C. § 23. There is no mention in the petition of U. S. Supreme Court Rule 19, 28 U.S.C. § 19.

The U. S. Supreme Court will not generally grant certiorari to review questions not presented or passed on by the courts below. *Tyrell* v. *District of Columbia*, 243 U.S. 1 (1917); *Duignan* v. *United States*, 274 U.S. 195 (1927); *Husty* v. *United States*, 282 U.S. 694 (1931); *Lawn* v. *United States*, 355 U.S. 339 (1958); *California* v. *Taylor*, 353 U.S. 553 (1957); *Neely* v. *Eby Construction Co.*, 386 U.S. 317 (1967); *Adickes* v. *Kress & Co.*, 398 U.S. 144 (1970).

The petition under the heading "QUESTIONS RESERVED FOR REVIEW" (p. 3) raises the question of whether or not a citizen can be denied his right to a hearing. The first heading, "Subsidiary Question Fairly Comprised" (p. 4) raises the question of city immunity from state and national constitutional restraints and antitrust laws; whether discovery may be denied a litigant in federal court; and whether or not the trial court could require the "statement" ordered by the trial court April 24, 1967. The second "Subsidiary Question Fairly Comprised" flatly states (without any reasoning whatsoever) the statement(s)

filed by plaintiff complied with the court order and whether under the circumstances of the case the District Judge could legally dismiss the suit.

It can readily be seen, even from a cursory reading of the Court of Appeals opinion, the questions reserved for review by the petition for writ of certiorari were not presented to nor passed upon by the court below.

CONCLUSION

The petition does not point out any conflict between the Court of Appeals decision and the decision of any other Court of Appeals. The decision of the Court of Appeals does not involve the decision of a state court in conflict with state law; does not raise an important question of federal law that should be settled; and does not conflict with the decisions of this court. The questions reserved by the petition for review have not been presented to or decided by the Court of Appeals. Therefore, the petition should be denied.

Respectfully submitted,

MARIAN C. RUSHING

EMORY J. CROFOOT
Attorneys for Respondent

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Respondents.

BRIEF FOR RESPONDENT MOUNT HOOD RADIO & TELEVISION BROADCASTING CORPORATION IN OPPOSITION

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OPINIONS BELOW

The opinion of the District Judge, United States District Court for Oregon, is unreported but is set

forth in the Petition as Apx. B at p. 82. The opinion of the Court of Appeals is reported at 443 F.2d 1047 and is set forth in the Petition as Apx. C at p. 85.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

Does the petitioner have a case calling for the grant of writ of certiorari under Rule 19 of this Court; petitioner's case having arisen upon a dismissal under the Fed. R. Civ. P. 41(b) for failure to comply with an order of court. The order of court directed the petitioner to set forth his witnesses, their expected testimony, the conspirators, and their role in the conspiracy. The court's order was issued after discovery procedure had failed.

Should the petitioner be permitted to raise issues which were not raised in the court below?

RULE INVOLVED

Fed. R. Civ. P. 41(b).

STATEMENT OF THE CASE

This respondent adopts the Statement of the Case as set forth in the brief of the Portland Boxing & Wrestling Commission.

ARGUMENT

The Court Below Decided Correctly

In upholding the District Court Judge, the Ninth Circuit Court of Appeals found that the petitioner had been given every opportunity to develop his case and prepare it for trial. The trial judge was exceedingly patient and indulgent. Rule 41(b) can be a harsh rule and should be used sparingly. The Ninth Circuit Court of Appeals found that the petitioner's actions more than merited the application of the rule.

In the case of Mount Hood Radio & Television Broadcasting Corporation, this respondent made a record of full cooperation with the petitioner, but this respondent, on the other hand, was totally frustrated in its efforts to ascertain the facts which constituted the basis of the petitioner's complaint. In the deposition of the plaintiff, Kurt Von Poppenheim, his answers indicated that he did not have any evidence to connect Mount Hood to the alleged conspiracy. See p. 102-108, Deposition of Plaintiff, Kurt Von Poppenheim. In answer to interrogatories, the plaintiff stated that he did not have any evidence connecting Defendant Mount Hood with the alleged conspiracy (Tr. 117-132). In response to the court's order of April 24, 1967 (Tr. 699-707) to set forth the conspiracy, Mount Hood was not even mentioned as a conspirator (Tr. 708-711). In the course of this proceeding, the plaintiff, in an attempt to connect television broadcasting with the alleged conspiracy,

has mentioned television stations other than this defendant (Tr. 784, 785-797).

Mount Hood Radio & Television Broadcasting Corporation did cooperate with the plaintiff in every way possible to assist the plaintiff in his discovery, including answering a set of interrogatories after the District Court entered an order relieving the defendants from any further necessity to answer interrogatories (Tr. of hearing on March 25, 1968, at 89-92; Tr. 752-765).

Certiorari Is Not Warranted Under Rule 19

The petitioner has included items in his Petition which were not raised in the court below and has misstated the record. This respondent contends that this is not a proper case for review by the United States Supreme Court. The elements found in Rule 19, United States Supreme Court Rules, are not found in this case. The Petition does not claim a conflict between circuits, nor does it claim an important state or territorial question decided in conflict with state or territorial law. The Petition does not claim an important question which has heretofore not been decided by this Court. This Court has, in fact, dealt with the issues. See *Link* v. *Wabash Railroad Co.*, 370 U.S. 626 (1962).

There is not a contention that the Ninth Circuit Court of Appeals has decided this case contrary to a decision of the United States Supreme Court, nor does the Petition claim that there is a need for the

Court to exercise its supervisory powers over the circuit courts.

Defendant's Rights to Due Process

In sifting through the fact, fiction and fantasy found in the Petition, one finds on p. 3 of his Petition the heart of the petitioner's contention; namely, that he ought to have been permitted to go to trial regardless of the state of the record, and that he should have been permitted to prolong and continue his discovery until such time as he was able, if ever, to find sufficient facts to support his ever shifting claim. As in a criminal case, the defendants in an antitrust action have some rights to a speedy trial and due process. When there is a failure to prosecute and a failure to cooperate with the court in getting the record into shape for trial, there ought to be some relief for the defendants under Rule 41(b). Petitioner imposed an onerous burden on this defendant, both in cost and time. The record disclosed early in the case that petitioner had no basis for his claim against Mount Hood Radio & Television Broadcasting Corporation. He ignored the fact that the sponsor controls the show (Tr. 752-765), and that several different stations were involved in televising wrestling in the City of Portland, and he ignored the fact that there was no relationship between Mount Hood Radio & Television Broadcasting Corporation and the Boxing & Wrestling Commission. He ignored the fact that wrestling in Portland was a show which was put on by a promoter and the television station

broadcasting that show was paid for that service by a sponsor; nothing more, nothing less. This respondent cooperated fully with the petitioner and gave him every opportunity to develop facts to substantiate his claim. He was totally unable to do so.

CONCLUSION

This respondent respectfully contends that the District Judge correctly applied Rule 41(b), Fed. R. Civ. P., and that the Ninth Circuit Court of Appeals correctly affirmed the decision of the District Judge. As in a criminal trial where a defendant has a right to a speedy trial, this defendant should be afforded some protection from protracted and frivolous litigation, where the plaintiff refuses to disclose his case and present justiciable issues. This defendant respectfully contends that there is no issue raised in this case which would compel this Court under the guidelines of Rule 19 to grant a writ of certiorari. Justice was done below. There should be an end to litigation in this case.

Respectfully submitted,

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SUPREME COURT, U. S.

Supreme Court, U.S.
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Respondents.

PETITION FOR REHEARING

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Respondents.

PETITION FOR REHEARING

APPELLANT'S PETITION FOR REHEARING

TO THE CHIEF JUSTICE AND JUSTICES, GREETINGS

PETITION FOR REHEARING ON DENIAL OF CERTIORARI

Petitioner seeks a review and reconsideration of

the denial of his petition for Writ of Certiorari entered on January 17, 1972.

In this wrestling anti-trust monopoly suit petitioner respectfully shows that this Court is reviewing *Flood* v. *Kuhn, et al,* No. 71-121, involving application of anti-trust monopoly in the baseball reserve clause as such affects the liberties of the petitioner and others similarly situated.

At the time the Court granted certiorari in *Flood* as it affects the monopoly provisions and the anti-trust laws and remanded California, Infra., the *Von Poppenheim* case on similar grounds might well have escaped the Court's attention on principles asserted and decided in those cases.

Following *Flood,* supra, this Court in *California Motor Transport Co.* v. *Trucking Unlimited,* No. 70-92 decided January 13, 1972, remanded the case to the Ninth Circuit for trial in an opinion by Douglas, J., joined by Burger, C. J., White, Marshall and Blackmum, J. J., concurring opinion in the result by Stewart, J., joined by Brennan. The like and similar principles urged in *Von Poppenheim* regarding constitutional, monopoly and anti-trust law. *California,* supra, and *Von Poppenheim* are based on compatible legal principles and arise from the same circuit. *California* would support *Von Poppenheim* particularly in view of the strong opinion by Douglas, J., supported by the other members of the court above named.

It would seem that these cases have much in com-

mon in the denial of individual liberties which appear to come within the sphere of the Court's policy of reviewing cases where such rights are violated. It would appear that these cases are based on the denial of liberties exercised by monopoly interests.

In context of the parties, von Poppenheim is aggrieved by the defendant Commission denying his license to engage in professional wrestling promotions. The respondents, the Alliance is an admitted monopolist pursuant to a federal court consent judgment. The monopoly prospers through a concert of action in which the defendant Association admittedly controls wrestling in the various Alliance approved territories. This is accomplished by the various "city or state regulatory agencies," as members in the Association acting in concert by denial of competitive licenses in the various territories.

The defendant Portland Commission denied von Poppenheim a license on the ground "that the issuance of a second matchmaker's license at this time would not be in the best interests of wrestling in the Portland area."

Promoter Owen holds the Oregon wrestling territory by grant of the Alliance and the Association without competition. Defendant KOIN supports the monopoly interstate by televising the Owen wrestling events and provides the local promoter with exclusive non-competitive coverage at a substantial fee.

Petitioner's rights to engage in a legitimate entertainment business nationally monopolized by these re-

spondents are denied. Respondents' own documentation supports the monopoly program in violation of the law.

Petitioner is denied a hearing on the merits or constitutional questions presented. There is but one promoter without competition whose position is by a grant or favor of the defendant Alliance or defendant Association in cooperation and concert of action with the regulatory agency. Wrestlers and promoters exist by grant or favor of the combination. Regulatory supervision is sham, and excludes competition.

The Court is asked to reconsider its rejection in the light of the foregoing.

Respectfully submitted,

ADELBERT G. CLOSTERMANN
Attorney for Petitioner

Counsel certifies this petition is made in good faith and not for the purpose of delay.

ADELBERT G. CLOSTERMANN
Attorney for Petitioner